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Self-Reflection within the Academy: The Absence of Women in Constitutional Jurisprudence

Karin Mika*

One does not have to be an ardent feminist to recognize that the contributions of women in our society have been largely unacknowledged by both history and education.¹ Individuals need only be reasonably attentive to recognize there is a similar absence of women within the curriculum presented in a standard legal education. If one reads Elise Boulding's *The Underside of History*² it is readily apparent that there are historical links between the achievements of women and Nineteenth century labor reform, Abolitionism, the Suffrage Movement and the contemporary view as to what should be protected First Amendment speech.³ Despite Boulding's depiction, treatises and texts on both American Legal History—and those tracing the development of Constitutional Law—present these topics as distinct and without any significant intersection.⁴ The contributions of women within all of these movements, except perhaps for the rarely men-

*Assistant Director, Legal Writing Research and Advocacy Cleveland-Marshall College of Law. J.D., 1989, Cleveland-Marshall College of Law. Thanks to Jerry Chattman and Arthur Landever for their inspiration and input. Special thanks to my research assistant, Amy Hull.

1. See Richard P. Morin, 'I looked for girls . . . who faced the world without timidity', THE BOSTON GLOBE, April 13, 1997, at B11 (Voices of New England) (edited conversation between Kathleen Odean and Correspondent Richard P. Morin). Odean, a school librarian, attempted to compile a list of children's books in which women were portrayed as "creative, capable, articulate, and intelligent." *Id.* She discovered that there were far more books portraying positive role models for boys than girls but did come up with 600 books that portrayed positive role models for females. *Id.* Despite this, Odean claims that, "School children read six times more biographies of men than women." *Id.* at B12.

2. ELISE BOULDING, *THE UNDERSIDE OF HISTORY* (1976).

3. See *id.* at 635-83. See generally Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653 (1988).

4. See, e.g., STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, *LAW AND JURISPRUDENCE IN AMERICAN HISTORY: CASES AND MATERIALS* (3d ed. 1995). Presser and Zainaldin's text was modified from its first edition to include a section on "Women and the Family." The section includes the Seneca Falls Declaration of Sentiments and an essay by Sarah Grimke, but these two documents (and discussion questions) only take up approximately ten pages. *Id.* at 545-53.

tioned Suffrage Movement, are largely ignored.⁵

Historian Gerda Lerner has posed the question: "Are women noteworthy when their achievement falls exactly in a category of achievement set up for men?"⁶ The poignant but self-evident answer is, "Obviously not"⁷ If women were deemed worthy of mention, the names of Myra Bradwell, Elizabeth Cady Stanton and Mary Harris "Mother" Jones would be as familiar to graduating law students as those of Clarence Darrow, Thurgood Marshall or Eugene V. Debs. We would also know of Harriet Scott, Mrs. Dred Scott, who filed her own suit for personal freedom, went virtually unacknowledged by the Supreme Court and has gone equally unacknowledged by posterity.⁸ If there were any equality of recognition, what we view as American legal traditions would involve a study of the important contributions of famous females, and this study would not be limited to, or segregated within, specialized or obscure programs.

This article will suggest that legal education has failed to represent the significant contributions of women in our American legal heritage within its curriculum. It urges that an acknowledgment of the feminine contribution must now be included within the curriculum of law schools in such a way that the contribution is incorporated within traditional substantive courses rather than select courses dealing with primarily "women's issues." Focusing on the Nineteenth and early Twentieth centuries, this article highlights the achievements and legal battles of women which were integral to the overall development of legal theory in our country. It discusses some of the history that has been left out, offers various reasons why such history has been left out and suggest reasons for its inclusion.

The article also considers the perpetuated stereotypes of women's roles

5. In fact, a reading of almost any textbook used in our core curriculum classes today would make it appear that women have had little involvement in the development of the law. Such textbooks might give the appearance that the only involvement women had with the development of law in this country was their vindication via Married Women's Property Acts or other protectionist legislation. Generally these reforms are discussed from an abstract perspective of a law simply being created, as opposed to whether any political movement initiated by discontented women brought about the change. See, e.g., RICHARD B. MORRIS PH.D, *STUDIES IN THE HISTORY OF AMERICAN LAW* 173-84 (1930). Even the Suffrage Movement, if mentioned at all, is more often than not treated as isolated from the remainder of legal history and the development of constitutional theory. Usually, the Suffrage Movement is associated with married women's property laws (within legal history texts). There seems to be an intimation that suffrage was solely a response to that particular disenfranchisement. See, e.g., KERMIT L. HALL ET AL., *AMERICAN LEGAL HISTORY: CASES AND MATERIALS* 264-67 (2d ed. 1996) (This book includes the Seneca Falls Declaration of Sentiments and is followed by the New York Women's Married Property Acts.). See also PRESSER & ZAINALDIN, *supra* note 4, at 500-50.

6. GERDA LERNER, *THE MAJORITY FINDS ITS PAST: PLACING WOMEN IN HISTORY* 13 (1979).

7. *Id.*

8. See generally Lea VanderVelde & Sandhya Subramanian, *Mrs. Dred Scott*, 106 *YALE L.J.* 1033 (1997).

during the previous century. It will point out various instances in which male efforts to "protect" women resulted in oppression rather than benefit and, in doing so, set the stage for a male-constructed and male-dominated legal system. This article suggests that this system resulted in the trivialization of females' roles within American legal history, and correspondingly, within American legal education. It is this author's contention that to allow this perpetuation in legal education is not only doing a disservice to female students, but is an inaccurate portrayal of history, which harms all students and diminishes the integrity of legal education.

"VOICES LOST IN THE CHASM SPEAK FROM THE SLOW ELOQUENT FACT OF THE CHASM"⁹: THE END OF THE COLONIAL ERA AND DEVELOPMENT OF THE FACTORY

It has never been the case that women were absent when matters of historical significance occurred. Women have been "somewhere"¹⁰ but have generally been treated as if they were invisible because they fell outside the power structure.¹¹ The true history of both the working woman and the professional woman in this country is not one that might be regarded as astonishing.¹² Yet it is not one that is well-known by either men or women. Since most modern historical teaching seems predicated on the theory that, for hundreds of years, women were involuntarily confined to the domestic sphere, there has been virtually no recognition that many of these "oppressed" women have made their distinctive mark upon history.¹³

While some of the stereotypes about societal attitudes during the Colonial era in the United States are certainly true, these attitudes initially were not so engraved as we now perceive them to have been.¹⁴ Early settlements depended upon the work of women both in and out of the home.¹⁵ Because the male "sphere" at the time was often "in the field," a woman's job was not restricted to raising children and performing domestic chores.¹⁶ Perhaps out of necessity rather than equality, women in America during both the 1600s and 1700s did everything that someone else was not already

9. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 201 (1991).

10. CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED* 39 (1987) ("Women have a history all right, but it is a history both of what was and of what was not allowed to be.").

11. "At best their relationship to power was implicit and peripheral and could easily be passed over as insignificant." LERNER, *supra* note 6, at 3.

12. Ruth Ashby writes, "Of course, women have always been in *actual* history—the progress of human events—as opposed to official history." HERSTORY: WOMEN WHO CHANGED THE WORLD xiv (Ruth Ashby & Deborah Gore Ohrn eds., 1995) [hereinafter HERSTORY].

13. *See id.* at 16-17.

14. *See* Elizabeth Dexter, *Colonial Women of Affairs, in AMERICA THROUGH WOMEN'S EYES* 21 (Mary R. Beard 1933).

15. *See* HERSTORY, *supra* note 12, at 16-17.

16. *Id.*

doing.¹⁷ This included entering professional trades, such as practicing law and medicine, which required no professional schooling for certification.¹⁸ This is not to say, of course, that there were not traditional prohibitions upon women within the work force; however, there was more flexibility because the law had yet to inscribe its prejudices on the whole of society.¹⁹

As the country became more developed economically and industrially during the late 1700s and early 1800s, the European view of "the genteel lady of fashion"²⁰ became the model of American femininity.²¹ Gender divisions of labor became much more traditional. Corresponding to this shift was the development of a wholesale societal attitude that fostered both legal and social discrimination against women. Women were legislatively prohibited from voting and, often, even when married, from owning property.²² Women were socially excluded from "male" activities by being barred from colleges and ostracized from the medical and legal fields.²³

The exclusion of women from higher education and "trades" created a societal challenge. Young women, who were expected to find mates, had no means of support.²⁴ These women were often viewed as burdens to

17. In fact, because John Adams spent most of his time engaged in politics, Abigail Adams became responsible for running the household, including all financial matters. She had to watch over lands owned by John and make numerous investment decisions. Although technically Abigail Adams had no civil existence, she was able to overcome this by demonstrating proficiency at these tasks and gaining the respect of those doing business with her. See CHARLES W. AKERS, *ABIGAIL ADAMS: AN AMERICAN WOMAN* 68-69 (1980).

18. See Sophie H. Drinker, *Women Attorneys of Colonial Times*, 57 MD. HIST. MAG. 335-51 (Dec. 1961).

19. See LERNER, *supra* note 6, at 16-20.

20. *Id.* at 18.

21. Bernhard J. Stern has commented:

Whatever distinctive characteristics the American family assumed were derived from the fact that the frontier areas of the United States were settled by individual families rather than by groups as in the agricultural villages of Europe. Their relative isolation tended to develop, therefore, a pronounced functional ingrown economic and affectional pattern. In the United States, moreover, diverse family forms were constantly being brought to these shores by different immigrant groups. These persisted as long as ethnic communities retained their strength but gave way, as their communities gave way, to the standardizing effects of industrial society.

Bernhard J. Stern, *The Family and Cultural Change, in WOMAN IN A MAN-MADE WORLD*, 13, 15 (Nona Galzer-Malbin & Helen Youngelson Waehrer eds., 1972).

22. See Joan C. Williams, *Married Women and Property*, 1 VA. J. SOC. POL'Y & L. 383, 385-90 (1994).

23. Licensing criteria was set up in some states for doctors and attorneys. Within the licensing requirement was the need to attend an approved school, or at least the strong encouragement that aspiring professionals do so. Most of these schools would not admit women. As a consequence, women could not complete the preferred program for certification and were squeezed out of the profession by males who were seeking the professional schooling. See AMERICAN LAW AND THE CONSTITUTIONAL ORDER: HISTORICAL PERSPECTIVES 566 (Lawrence M. Friedman & Harry N. Scheiber eds., 1988).

24. See N.E.H. HULL, *FEMALE FELONS: WOMEN AND SERIOUS CRIME IN COLONIAL MASSACHUSETTS* 54 (1987); LAWRENCE STONE, *THE FAMILY, SEX AND MARRIAGE IN*

their families and to the whole of society.²⁵ Soon after industrialization began in North America these women (and later women with small children) were encouraged to take on factory jobs.²⁶ Since the work was believed to be simply an extension of what the women would otherwise do at home, the factory was said to offer the ultimate benefit—a ready means of supplementing family income and of providing subsistence for unmarried daughters.²⁷

Admittedly, the earliest factories in the United States were intended to be set-up much differently from those existing in Europe, known universally for their oppression and abhorrent working conditions.²⁸ One of the first (and perhaps most notable) factories set-up with this “softer” approach to treating its workers was the Lowell Textile Factory of Lowell, Massachusetts, established in 1823.²⁹ The Lowell Factory was staffed with all women who stayed in boarding houses.³⁰ Chaperons, or “matrons,” were on hand to ensure that the women did not fall victim to any type of “vice.”³¹ By being housed in an all-female community, the women were able to establish social relationships and share ideas. The factory owners additionally provided a library and on-site lecturers so that their “genteel”

ENGLAND 1500-1800, at 179 (1977).

25. See PAT JALLAND, *WOMEN, MARRIAGE, AND POLITICS 1860-1914*, at 253 (1986).

26. The contemporary view was that factory jobs would give the women a sense of “accomplishment.” See generally Edith Abbott, *Women in Industry*, in *AMERICA THROUGH WOMEN’S EYES* 127, 129 (Mary R. Beard ed., 1933).

Another point of interest in connection with the employment of women in the early mills and factories is that their work in these establishments was approved on social as well as on economic grounds. . . . [I]n the colonial period great apprehension existed lest women and children, particularly those who were poor and in danger of becoming a public charge, should fall into the sin of idleness.

Id. at 132.

27. Those with children were encouraged to bring them along. “The more children a family had, the more eagerly they were sought by the factory, for they provided a constant supply of cheap labor.” *THE FACTORY GIRLS* xv (Philip S. Foner, ed. 1977) [hereinafter *FACTORY GIRLS*]. The children could work in the factories and “be a benefit to society” rather than remaining idle or being a burden to society. *Id.*

28. Originally it was believed that industrial development should remain in Europe and that agriculture would sustain the United States; however, when the profitability of the factory-system was recognized, some of the nation’s leaders (such as Thomas Jefferson) changed their view. See *id.* at xiv-xvii. The system was to be set up differently than the British system in order to avoid the creation of a pauperized underclass. See *id.* Entrepreneurs, such as Francis Cabot Lowell, toured Britain in order to figure out how better to industrialize the United States. See *id.* Lowell is credited with initiating the “Waltham experiment” (named after a factory in Waltham, Massachusetts) which dealt more with machinery logistics than how the employees would be treated. See *id.* As part of the factory system, Lowell and his colleagues determined that the female employees would be housed in dorms, supervised and obligated to attend religious instruction. See *id.*

29. For a history of the New England mills, see generally HANNAH JOSEPHSON, *THE GOLDEN THREADS: NEW ENGLAND’S MILL GIRLS AND MAGNATES* (1949).

30. *Id.* at 52-72.

31. *FACTORY GIRLS*, *supra* note 27, at xvii.

workers could better themselves.³² The designers of the Lowell Factory system believed that this community aspect distinguished their factory from the oppressive European systems.³³ Lowell women could engage in a meaningful occupation, help their families, live in a friendly environment and participate in "virtuous" pastimes (such as reading and attending lectures)—all with pay.³⁴

Lowell and similarly set-up factories were idyllic at first, but over time the situation changed.³⁵ As the United States became more industrial than agrarian, there was increased economic competition both within the country and with Europe.³⁶ Factory owners endeavored to make their factories more profitable and often did so at the expense of their workers.³⁷ The workers began to resent the factory conditions, complained, organized and engaged in various work slowdowns and strikes to get their point across.³⁸ Eventually, the women at Lowell and the other female-staffed factories won the fight for a ten hour workday and several other concessions related to assigned duties and divisions of labor.³⁹

LOWELL'S ABSENCE IN LEGAL HISTORY

Although neither the Lowell factory workers nor other female work forces changed the industrial world, their existence should not have fallen into a historical void. There are several reasons why Lowell, and the similarly situated female-staffed factories, should be acknowledged. In the first place, the actions of the female operatives were ones that predated most of the major labor struggles that are now regarded as noteworthy within the development of this country's labor law.⁴⁰ Secondly, the historical context of the struggle is significant. In viewing the actions of the female factory workers, it should be kept in mind that, at the time, women

32. *Id.* at xix. Mill operative Lucy Larcom stated, "We had all been fairly educated at public or private schools, and many of us were resolutely bent upon obtaining a better education." LUCY LARCOM, *A NEW ENGLAND GIRLHOOD* 142 (1889). Larcom eventually graduated from Monticello Female Seminary and became editor of the Boston magazine "Our Young Folks." *Id.* at 20.

33. *FACTORY GIRLS*, *supra* note 27, at xiv-xvii.

34. *See id.* at xvii.

35. *See* JOSEPHSON, *supra* note 29, at 74.

36. *See generally* *FACTORY GIRLS*, *supra* note 27, at 57-156.

37. *See id.*

38. *See* JOSEPHSON, *supra* note 29, at 225.

39. *See id.*

40. In defense of the chroniclers of history, the Lowell women were certainly not the first to complain about working conditions. They were not the first to organize in an effort to improve such conditions. Trade and craft unions in predominantly male work forces began springing up near the end of the Eighteenth century. No doubt the nature of the times influenced the female workers to seek better conditions as opposed to some novel theory of equality or heightened sense of self-determination. *See id.* at 228-29.

were near the bottom of the list of the disenfranchised and the powerless.⁴¹ The workers could not proceed through "appropriate administrative channels."⁴² Nor could the women leave a bad employment situation to pursue another meaningful trade.⁴³ Worse yet, the female factory workers were actually condemned for complaining about their working conditions, labeled "overly aggressive," "ungrateful" and "unladylike" by both men and even demure women co-workers.⁴⁴

Despite having no true power and little expectation of success, the women *did* organize and protest.⁴⁵ Although the women may not have seen their mission as anything other than to improve their own situations, their struggle is still significant. It presents a different perspective on how and why labor unions began in this country. An incorporation of the female factory situations in legal study would demonstrate that the formation of labor unions has not always been about men organizing, and that labor legislation has not always been about protecting women who could not or did not assert their rights. The Lowell efforts are no less important to the development of labor unions in this country than are the efforts of their male counterparts; yet it is the relationship of women to the labor movement in this country that has been marginalized. That is precisely the problem with their exclusion from legal history. The activities were the same, but history, including legal history, has treated men's labor struggles as revolutionizing employment standards and facilitating the genesis of labor law while simply ignoring the contributions of women.

A MORE DELICATE ORGANISM: SUPREME COURT VIEWS ON WORKING WOMEN

During the latter portion of the Nineteenth century, a number of states enacted legislation limiting the hours women could work.⁴⁶ While some viewed this as a feminist victory, others saw the legislation as more of the same oppressive paternalism that prevented women from making their own choices.⁴⁷ The laws wound up being challenged and defended by many

41. See Nadine Taub & Elizabeth M. Schneider, *Women's Subordination and the Role of Law, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 151, 153 (David Kairys ed., rev. ed. 1990).

42. *Id.*

43. See JOSEPHSON, *supra* note 29, at 221-27.

44. *Id.* Each woman, regardless of intellect, was relegated to the one-size-fits-all status of not only being proficient at domestic chores and child-rearing, but somehow believing it was their sacred duty to want no more.

45. FACTORY GIRLS, *supra* note 27, at 9-10.

46. States included Colorado, Connecticut, Louisiana, Maine, Maryland, Massachusetts, New York, New Jersey, Oklahoma, Oregon, New Hampshire, North Dakota, Pennsylvania, Rhode Island, South Carolina, South Dakota, Virginia, Washington and Wisconsin. See *Muller v. Oregon*, 208 U.S. 412, 417, 419 n.1 (1908).

47. See generally Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

individuals who were theoretically on the same side of the women's rights issue.⁴⁸

United States Supreme Court decisions regarding women's issues during this era are a composite of some truthful perceptions, standard constitutional jurisprudence of the time and a fair amount of stereotyping.⁴⁹ There are also noticeable inconsistencies on the part of the Court as it viewed general labor constraints versus "female" labor constraints.⁵⁰

After ushering in the *Lochner*⁵¹ era with a decision invalidating an overall statutory limitation on the workday, the Supreme Court dealt with similar labor issues specific to women.⁵² Where women were concerned, the Supreme Court upheld statutes limiting the number of hours that could be worked and the times of day during which "women's work" could take place.⁵³ The Court did so primarily on a "state's prerogative" basis but additionally relied on broad descriptions of female "physical delicacies" in

This author has often had conversations with individuals who have made the argument that women want it both ways; they want protection where they feel like it and equality where they feel like it. The limitation on hours is singled out as proof for that premise. Admittedly it was not a bad thing for legislatures to limit the working hours of women, and admittedly, that legislation was prompted by female groups and heralded as a success in the struggle for women's rights. However, the situation is not all it appears to be. In the first place, as this paper presents, it would have been a good thing to limit both the male and female workday, not just the females'. Females just happened to be the beneficiaries at the time. Secondly, the plight of the female that necessitated intervention was the direct result of oppression. Had men and women started on an equal societal footing in this country, some factory owners could have been women and the course of labor law would likely have been much different. Labor legislation might very well have been equal with respect to what benefits were provided to both men and women. There is a similar parallel with the plight of the Native American. There are currently many complained-about legislative preferences; these, however, are the end result of poor past legislation that attempted to do what the government thought was best for Native Americans. Since Native Americans were never part of their own societal self-determination, they, as well as the federal government, are left in a situation where neither legislation nor lack of legislation will remedy what has happened. See Patrick Clarke, *Tribal Affiliation Based Employment Preferences: Is this an Allowable Practice Under Title VII's Indian Preference Provisions?*, 20 T. MARSHALL L. REV. 291, 292-93 (1995).

48. See LEWIS J. PAPER, BRANDEIS 164-65 (1983). It was Louis Brandeis who defended the challenge to the constitutionality of laws limiting the working hours for women. Brandeis, at the time, was a civil liberties lawyer whose talents were solicited by Josephine Goldmark (his sister-in-law) and Florence Kelley of the National Consumers League. Brandeis was a sympathizer of unions and had hoped to limit working hours in general; however, he focused on establishing the validity of the laws protecting females. As his strategy, he emphasized the delicacy of the female. This was a strategy approved of by both Goldmark and Kelley. See *id.*

49. See *infra* notes 52-64 and accompanying text.

50. See *infra* notes 54-61 and accompanying text.

51. *Lochner v. New York*, 198 U.S. 45 (1905) (Note that Justices Harlan, White, Day and Holmes dissented from this opinion and that Justice Holmes wrote a separate dissent.).

52. Mark G. Yadof, 1990 *Survey of Books Relating to the Law: The Federal Courts and the Constitution*, 88 MICH. L. REV. 1366, 1400-07 (1990).

53. See *infra* notes 57-61 and accompanying text.

order to justify the need for such statutes.⁵⁴ Most notably, in *Muller v. Oregon*,⁵⁵ Justice Brewer commented

[t]hat woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity, continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of women becomes an object of public interest and care in order to preserve the strength and vigor of the race. . . . Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained. It is impossible to close one's eyes to the fact that she still looks to her brother and depends on him.⁵⁶

In *Radice v. New York*,⁵⁷ the Court was confronted with a constitutional challenge to a statute that prohibited women from working between the hours of 10 p.m. and 6 a.m. Justice Sutherland, writing for the majority, justified that statute by stating:

The legislature had before it a mass of information from which it concluded that night work is substantially and especially detrimental to the health of women. We cannot say that the conclusion is without warrant. The loss of restful night's sleep cannot be fully made up by sleep in the day time, especially in busy cities, subject to the disturbances incident to modern life. The injurious consequences were thought by the legislature to bear more heavily against women than men, and, considering their more delicate organism, there would seem to be good reason for so thinking.⁵⁸

Intrestingly, a year earlier, in *Adkins v. Children's Hospital*,⁵⁹ Justice Sutherland declared that upholding a minimum wage statute would

ignore all the implications to be drawn from the present day trend of legislation, as well as that of common thought and usage, by which woman is accorded emancipation from the old doctrine that

54. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 140 (1872) (Bradley J., concurring).

55. 208 U.S. 412 (1908).

56. *Id.* at 422.

57. 264 U.S. 292 (1924).

58. *Id.* at 294.

59. 261 U.S. 525, 553 (1923).

she must be given special protection or be subjected to special restraint in her contractual and civil relationships.⁶⁰

He also stated that the inequality between the sexes "have now come almost, if not quite, to the vanishing point."⁶¹

While on the surface there is seemingly no rational justification for the contradiction, it might very well be that the distinction is one in which there was a perceived need for physical protection but not necessarily a perceived need for decision-making protection. There was likely no contradiction in Justice Sutherland's mind because he was taking into consideration what he viewed as physical realities. Although some of the Supreme Court's assessments are accurate (women bear children and are generally smaller in size than men), one wonders whether it might not have been better if the Court had simply declared that it was in the interest of the health and well-being of the citizenry in general to place limitations upon *everyone's* workday. Aside from this approach, the Court could have tempered its commentary regarding the extreme delicacies of women so that it did not appear that most women were nearly invalids.

United States Supreme Court Justice Ruth Bader Ginsburg has stated, "By enshrining and promoting the woman's 'natural' role as homemaker, and correspondingly emphasizing the man's role as provider, the state impeded both men and women from pursuit of the very opportunities that would have enabled them to break away from familiar stereotypes."⁶² Rather than acknowledge that poor factory conditions and long working hours might have deleterious effects on any individual subjected to them, the Supreme Court continued to reinforce and perpetuate many stereotypes about women.⁶³ True, in *Bunting v. Oregon*,⁶⁴ decided nine years after *Muller*, the Supreme Court upheld an hours restriction for male factory workers. The Court did not, however, include an elaborate discussion on the potential detrimental health effects of lengthy hours.

Unfortunately, it has been the female "frailty" descriptions that history has accorded the most credibility.⁶⁵ These stereotypes continue to be accepted within our society.⁶⁶ Perhaps it is even fair to say that some of

60. *Id.*

61. *Id.*

62. The Honorable Ruth Bader Ginsburg, *Remarks on Women Becoming Part of the Constitution*, 6 LAW & INEQ. J. 17, 21 (1988).

63. See *supra* note 56 and accompanying text.

64. 243 U.S. 426 (1917).

65. See generally Katherine C. Sheehan, *Toward a Jurisprudence of Doubt*, 7 UCLA WOMEN'S L.J. 201 (1997).

66. See WINNIE HAZOU, *THE SOCIAL AND LEGAL STATUS OF WOMEN: A GLOBAL PERSPECTIVE* 13 (1990).

The caste-like status differentiation has become normal and accepted by all, even the less-privileged sex. Women have been socialized into believing in their inferiority of endowment; they accept a special woman's sphere which

these stereotypes have been internalized by women as a class; even though modern society regards women on a more equal intellectual and legal plane, many women still do not believe it, or believe that there exists an exclusively feminine realm comprised of domesticity.⁶⁷ An example of this attitude manifesting itself might be Marilyn Quayle's comment, "Women do not wish to be liberated from their essential natures as women."⁶⁸ Although Ms. Quayle took substantial abuse for her statement, no doubt she spoke for a great many women.⁶⁹

"PEOPLE CALL ME A FEMINIST WHENEVER I EXPRESS SENTIMENTS THAT DIFFERENTIATE ME FROM A DOORMAT OR A PROSTITUTE"⁷⁰:
TRAILBLAZERS IN WOMEN'S RIGHTS

Despite the societal perpetuation of stereotypical realms and behavior, certainly not all women would allow the "delicacy" of their constitutions to hinder their pursuits.⁷¹ For example, Abigail Adams, without any formal education, distinguished herself as the intellectual equal, if not advisor, to her husband, John.⁷² During her life she wrote several thousand letters to both men and women. In these letters she discussed freely her perspectives on women's issues, child rearing, appropriate structures of government and even foreign policy.⁷³ It is evident that the men who answered these letters did not find Abigail Adams frivolous or of such an in-

is ascribed at birth, and they do not generally question their unequal status.

Id.

67. See generally SIMONE DE BOUVIER, *THE SECOND SEX* (1961).

68. Karen Ball, *Hillary Clinton Returns Fire After GOP Blasts*, ASSOCIATED PRESS, COURIER-J. (Louisville KY.) Aug. 25, 1992, at 3A.

69. Leo Kanowitz has commented upon this internalization of a seeming inferiority. Kanowitz states:

With the exception of an intellectual elite or those who have inherited or retained the feminist tradition, most American women do not appear to be greatly exercised by the persistence of inequities in their legal status. . . . [An] . . . explanation may lie in the nature of the laws that discriminate on the basis of sex. Though legal rules often discriminate between the sexes, they do not always favor men over women. In certain areas, women appear to be the beneficiaries rather than the victims of the law's discrimination. . . . Fear of losing these and other legal "protections" as the *quid pro quo* for achieving full legal equality may also partly explain the decline of women's concern with their legal status since the adoption of the Nineteenth Amendment.

LEO KANOWITZ, *WOMEN AND THE LAW: THE UNFINISHED REVOLUTION* 2-3 (1969).

70. Rebecca West, in *THE MACMILLAN DICTIONARY OF QUOTATIONS* 212 (John Daintith & Hazel Egerton eds., 2d ed. 1989).

71. See *infra* notes 71-79 and accompanying text.

72. See AKERS, *supra* note 17, at 8-15. Although Abigail Adams proclaimed herself to be of a "delicate nature," this did not stop her lifelong dedication to learning, nor did she ever doubt that women should be educated and encouraged to better themselves by education.

73. See *id.*

tellectual inferiority that she was any less of a peer.⁷⁴ There were others, Mercy Otis Warren, Margaret Fuller and Catherine Beecher—seemingly constrained by the time period in which they lived, yet each with as forceful a personality in history as her male peers.⁷⁵

Who were these females who ignored their perceived role in society and trailblazed despite overwhelming odds? How did they get the way they were? Conjecture would be interesting at this point. It could be hypothesized that these "trailblazers" were exposed to political ideals through higher education in private boarding schools or private tutoring.⁷⁶ There are other hypothetical generalizations—being exposed to European socialism, hailing from a family with liberal, tolerant males or having an "intellectual" social climate within their community.⁷⁷ It has also been suggested (primarily by men, of course) that the over-aggressiveness of these women had nothing to do with environment. Rather, the attitude was attributable to compensating for sexual dissatisfaction, perhaps not being able to get or keep a man or perhaps not caring for men at all.⁷⁸ Mary Wollstonecraft, who is more closely associated with being Mary Shelley's mother than she is with her 1792 novel *A Vindication of the Rights of Women*, was openly labeled a "man hater" with "penis envy."⁷⁹

The inevitable finding is that there is not any single unifying personal characteristic that made a woman more or less likely to be interested in what were traditionally regarded as within a man's realm of thought or action. Female villains and heroes, activists and nonactivists emerged, much like their male counterparts, sometimes from their backgrounds, sometimes from their education, sometimes from their life's experiences and sometimes simply from being in the right place at the right time. However, the problem today is that their existence is rarely acknowledged. With the handful that are recognized, their study often concentrates on the psychology of their identity as opposed to their achievements or influences on general society.⁸⁰

74. In fact, many believed Abigail could have prevented some poor political decisions on her husband's part had she been consulted. See *id.* at 161.

75. See ANNE FIROR SCOTT & ANDREW MACKAY SCOTT, *ONE HALF THE PEOPLE: THE FIGHT FOR WOMAN SUFFRAGE* 7 (1982).

76. There simply were not many places for females to gain a formal education. Oberlin College opened to women in 1833, with a few following in the middle Nineteenth century. Wellesley, Smith, Spelman, Bryn Mawr, Randolph-Macon, and Barnard did not open until after 1875. See Linda K. Kerber, *The Unfinished Work of Alice Mary Baldwin*, in *VISIBLE WOMEN* 352-53 (Nancy A. Hewitt & Suzanne Lebsock eds., 1993).

77. See generally BOULDING, *supra* note 2, at 617-50.

78. See LERNER, *supra* note 6, at 8-9.

79. Miriam Brody Kramnick, *Introduction* to MARY WOLLSTONECRAFT, *A VINDICATION OF THE RIGHTS OF WOMAN* 7 (Miriam Kramnick ed., Penguin Classics 1975) (1872) (quoting newspaper articles written at the time the book was released).

80. See LERNER, *supra* note 6, at 14-20.

"NO ONE KNOWS ANY MORE OF WHAT LIES BEYOND OUR SPHERE OF ACTION, THAN YOU AND I; AND WE KNOW NOTHING"⁸¹: THE WOMEN'S SUFFRAGE MOVEMENT

The Women's Suffrage Movement crossed more class, social and legal boundaries than did any other social movement in the United States.⁸² It was responsible for laws made and laws rejected. It intersected with the enactments of the Thirteenth, Fourteenth, Fifteenth and Nineteenth Amendments to the Constitution and spanned a time period from approximately 1839 until 1920.⁸³ Yet even a mention of its existence is virtually absent from law school curriculum. Indeed, even courses in American legal history give it scant attention.

The Suffrage Movement, contrary to popular myth, did not spring up in isolation at the onset of the Twentieth century or as a byproduct of the roaring twenties.⁸⁴ The Movement was a true movement—the end result of an amalgamation of other Nineteenth century movements that ended in what seemed to be the most appropriate response to what women deemed to be their oppressed lot.⁸⁵ The discontent of women stemmed from a variety of factors—mistreatment in the factories, preclusion from educational opportunities and an inability for women to gain entitlement to an identity equal to, or even separate from, their male counterparts.⁸⁶

The Suffrage Movement did not have to wind up as the Suffrage Movement. It could just have likely wound up as the Women's Social Equality Movement, or even the Women's Movement for Equal Educational Opportunities.⁸⁷ No one really started out as a "Suffragette," nor was voting the female activists' initial interest. Lucretia Mott, one of the recognized founders of the Suffragette Movement, was a Philadelphia Quaker preacher interested in temperance and in ending slavery.⁸⁸ Others,

81. 1 HISTORY OF WOMAN SUFFRAGE 422 (Elizabeth Cady Stanton et al. eds., 1881) (from the eulogy of Lucretia Mott).

82. See generally SCOTT & SCOTT, *supra* note 75.

83. THE CONCISE HISTORY OF WOMAN SUFFRAGE 1-48 (Mari Jo Buhle & Paul Buhle eds., 1978) [hereinafter CONCISE HISTORY].

84. "Suffragism has not been accorded the historic recognition it deserves, largely because woman suffrage has too frequently been regarded as an isolated institutional reform." ELLEN CAROL DUBOIS, FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN'S MOVEMENT IN AMERICA 1848-1869, at 17 (1978).

85. See *id.* at 17-18.

86. See *id.* at 18. Married women had no freedom to contract, and unmarried women were relegated to an almost worse fate by not being afforded opportunities to provide for themselves. Married women, for all intents and purposes, became synonymous with their mates and unmarried women were indoctrinated into a society that expected them to find mates. See LERNER, *supra* note 6, at 49.

87. See generally DUBOIS, *supra* note 84, at 15-52.

88. See LOIS W. BANNER, ELIZABETH CADY STANTON: A RADICAL FOR WOMAN'S RIGHTS 24 (1980).

such as Elizabeth Cady Stanton⁸⁹ and Susan B. Anthony,⁹⁰ began their involvement as abolitionists. Some, such as Lucy Stone and Antoinette Brown, were exposed to inequities between males and females while in college.⁹¹ Victoria Woodhull (who, with Frederick Douglass, was nominated to run for president by the Equal Rights Party) was a woman who simply did not want to be limited by the conventions of the times.⁹²

Doubtless, all eventual "Suffragettes" were bright, articulate women who found a kinship with one another in recognizing that they wanted something more in life than what society would allow them. However, there were divergent priorities even among these women. Many believed that acquiring voting rights would not achieve any level of equality with men (which was true on many levels) and so they focused on other reforms.⁹³ Writer Charlotte Perkins Gilman, discussing women and economics, argued that the entire arbitrary system of allocating domestic chores to women and not men was in need of wholesale reform.⁹⁴ Margaret Sanger advocated sex education and the use of birth control as a means for women to escape societal dominance.⁹⁵

Other women believed that the vote was the one thing that would empower women to force politicians to take into consideration female

89. Cady Stanton came from a well-off family in Johnstown, New York. Her father was an attorney who would placate his daughter's wishes to be freed from "maternal discipline" by allowing Elizabeth to sit in on meetings with clients and read the law books on the shelves. As she grew older, he took her with him occasionally to act as a legal assistant and encouraged her to study law. Cady Stanton became interested in abolitionism in the 1830s in many respects because that was what intellectuals in that area were focusing on at the time. Her brother-in-law Gerrit Smith was an early abolitionist, as was Henry Brewster Stanton, whom Elizabeth met in 1839. See *id.* at 7-19.

90. Susan B. Anthony was born in 1820 and was raised as a Quaker. Similar to Lucretia Mott, Anthony opposed slavery on moral and religious grounds. As a young woman she worked toward the elimination of slavery within the abolitionist movement. Angered that, as a woman, she had no legal right to speak, Anthony linked more closely with the suffrage movement by 1851. See Bonnie Eisenberg & Mary Ruthsdotter, *Susan B. Anthony*, in *HERSTORY*, *supra* note 12, at 108.

91. Lucy Stone writes of female Oberlin graduates not being allowed to read their own essays for Commencement exercises. Females selected to write essays were compelled to have a male professor read them. See Lucy Stone, *Pioneer of Woman's Rights*, in *AMERICA THROUGH WOMEN'S EYES*, *supra* note 14, at 187, 188-90. Brown was discouraged from theology at Oberlin and was eventually allowed by the college to take theology courses but not receive a degree. See Ruth Ashby, *Antoinette Brown Blackwell*, in *HERSTORY*, *supra* note 12, at 116-17.

92. See Emanie Sachs, *The Terrible Siren*, in *AMERICA THROUGH WOMEN'S EYES* *supra* note 14, at 265, 266. Woodhull once said, "I am too many years ahead of this age." See *id.* While she is often labeled a "free lover" with a radical lifestyle, Woodhull was really no more than any modern day, flamboyant, successful, entrepreneur (male or female) who might now appear on the cover of Time Magazine. See generally LOIS BEACHY UNDERHILL, *THE WOMAN WHO RAN FOR PRESIDENT: THE MANY LIVES OF VICTORIA WOODHULL* (1995).

93. See BANNER, *supra* note 88, at 10-19.

94. See LERNER, *supra* note 6, at 55.

95. See *id.*

"concerns."⁹⁶ Such concerns included the almost universal objection of married women to their legally imposed civil death⁹⁷ and the discontent of all women who were foreclosed from educational opportunities by an all-male academy.⁹⁸ The suffrage faction ultimately became the "cause," perhaps because the movement corresponded with the anti-slavery campaign that had voting rights as one of its own goals, and perhaps because the request was small in comparison to the wholesale societal changes advocated by some of the more radical feminists.⁹⁹ At the outset, the request for women's suffrage was itself considered radical but was eventually seen as "essential both as a symbol of women's equality and individuality and a means of improving women's legal and social condition."¹⁰⁰

The origins of the Suffrage Movement fell primarily within the origins of the Abolitionist Movement.¹⁰¹ While popular history associates the name of Susan B. Anthony with the Suffrage Movement (solidified by her picture on the ironically obscure dollar coin), the Suffrage Movement was, in fact, a true collective effort with its influential members too numerous to mention.¹⁰² Indeed, if anyone could have been said to be the leader of the movement it would probably be Elizabeth Cady Stanton.¹⁰³ It was through the abolition movement that Stanton became acquainted with Lucretia Mott (already regarded as a feminist leader), Lucy Stone and Susan B. Anthony.¹⁰⁴

Many of the abolitionists, particularly Stanton and Anthony, decided early on that their efforts should be directed towards establishing universal

96. See JoEllen Lind, *Dominance and Democracy: The Legacy of Woman Suffrage for the Voting Right*, 5 UCLA WOMEN'S L.J. 103, 117 (1994).

97. Married women could not enter into contracts, could not be property holders and could bring no action against an abusive spouse. For a discussion of the legal constraints upon women, see Marina Angel, *Criminal Law and Women: Giving the Abused Woman Who Kills a Jury of Her Peers Who Appreciate Trifles*, 33 AM. CRIM. L. REV. 229, 252-57 (1996).

98. See LERNER, *supra* note 6, at 51-52.

99. See Lind, *supra* note 96, at 126-54.

100. Marjorie S. Wheeler, *Introduction to ONE WOMAN, ONE VOTE: REDISCOVERING THE WOMAN SUFFRAGE MOVEMENT* 9 (Marjorie Spruill Wheeler ed., 1995).

101. See DUBOIS, *supra* note 84, at 31-32. The slavery issue was *the* issue of the day with the country sharply divided on the issue. The earliest abolitionists opposed slavery on the basis of benevolence and religious reasons, but these evolved into opposition on both philosophical and political grounds. "Women's involvement in abolitionism developed out of traditions of peitistic female benevolence that were an accepted aspect of women's sphere in the early nineteenth century." *Id.*

102. The most comprehensive listing of involved individuals and what occurred was compiled by the "suffragettes" themselves in a six volume history. See *generally* HISTORY OF WOMAN SUFFRAGE, *supra* note 81.

103. See BANNER, *supra* note 88, at 25-26. Stanton was the one who suggested to Lucretia Mott that a woman's rights convention be held.

104. See DUBOIS, *supra* note 84, at 39. (Stone and Anthony were agents of the anti-slavery society).

equality as opposed to simply abolishing slavery.¹⁰⁵ This notion was solidified when Lucretia Mott and Elizabeth Cady Stanton attended the World's Anti-Slavery Convention in 1840 and were relegated to watching from a balcony.¹⁰⁶ It was at this point that the women decided that in order for female voices to be heard, in both the United States and in Europe, they must first acquire the right to a voice in government.¹⁰⁷ The end result was the planning of the Seneca Falls Convention of 1848 and the "Declaration of Sentiments" which included a resolution that "it is the duty of the women of this country to secure to themselves their sacred right of elective franchise."¹⁰⁸

The Civil War put women's issues on the back burner and the Suffrage and Abolition Movements united to work towards emancipation of the slaves.¹⁰⁹ After the war, Stanton and Anthony were hopeful that they could return to campaigning for equal rights.¹¹⁰ They were optimistic politically because supporters of women's equality had been so intertwined with the constituency who supported abolition.¹¹¹ Although the activists returned to an aggressive campaign at the end of the war, they were not rewarded in the way they anticipated.¹¹² Not only did the "anti-slavery" amendments leave out any reference to women's equality but, in 1866, when the Fourteenth Amendment was enacted, the text specifically provided penalties for any state that denied "males" over the age of twenty-one the right to vote.¹¹³

At the time the Fourteenth Amendment was ratified, Stanton commented rather prophetically, "It will take us a century at least to get it

105. *See id.*

106. *See* AILEEN S. KRADITOR, *THE IDEAS OF THE WOMAN'S SUFFRAGE MOVEMENT 1890-1920*, at 2 (1965).

107. *See id.*

108. *Declaration of Sentiments*, in *HISTORY OF WOMAN SUFFRAGE* *supra* note 81, at 70. Many women, including Lucretia Mott, did not want suffrage included as one of the demands out of a fear the group "would look ridiculous." *See* DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* 341 (1990).

109. *See* ELEANOR FLEXNER, *CENTURY OF STRUGGLE, THE WOMAN'S RIGHTS MOVEMENT IN THE UNITED STATES* 108-13 (1975).

110. *See id.*

111. *See* DUBOIS, *supra* note 84, at 53.

112. *See id.*

113. The exact clause reads:

But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

U.S. CONST. amend. XIV, § 2.

out.”¹¹⁴ In *Minor v. Happersett*,¹¹⁵ the Supreme Court solidified the fate of women’s suffrage at the time by holding that the Fourteenth Amendment’s Privileges and Immunities Clause did not provide women with any new privileges and immunities; the clause merely protected pre-existing rights. Accordingly, if women did not have entitlement to suffrage before the amendment, the new amendment did not ensure them the vote.¹¹⁶

The feminists thereafter found themselves without substantial support from the abolitionists whom they had supported earlier. It was not entirely a question of the withdrawal of support,¹¹⁷ but a splintering of priorities. Abolitionists were not satisfied with the level of enfranchisement former slaves had achieved and worked primarily towards that goal subsequent to the Civil War.¹¹⁸ Those who prioritized women’s suffrage were left in the wake of the larger, more politically popular, movement and lost the activism of some of their most capable members.¹¹⁹ Some supporters of the Reconstruction Amendments who might have otherwise supported suffrage, commented that it was “the Negro’s hour” and believed feminist issues would have to wait their turn.¹²⁰

After losing the battle to gain suffrage at the close of the Civil War, the movement lost considerable momentum.¹²¹ Stanton and Anthony then carried on what was regarded as the “radical” quest for suffrage with little support.¹²² In fact, in 1872, Susan B. Anthony took matters into her own hands, registered as a voter and cast a ballot in a federal election.¹²³ She

114. DUBOIS, *supra* note 84, at 61 (quoting a letter from Elizabeth Stanton to Gerrit Smith, January 1, 1866).

115. 88 U.S. (21 Wall.) 162, 171 (1874).

116. The Court drew upon the rationale that if the original Constitution had guaranteed the rights of all citizens to vote, it would not have been necessary to enact the Fifteenth Amendment which guaranteed that the right to vote would not be abridged “on account of race, color, or previous condition of servitude.” *Id.* at 175. Chief Justice Waite commented, “[I]f all were already protected why go through with the form of amending the Constitution to protect a part?” *Id.* at 175-76.

117. There were some abolitionists who distanced themselves from the suffrage issue because supporting such a “radical” concept might jeopardize popular support for emancipation. See Vivian Sue Shields & Suzanne Melanie Buchko, *Antoinette Dakin Leach: A Woman Before the Bar*, 28 VAL. U. L. REV. 1189, 1194 (1994).

118. See DUBOIS, *supra* note 84, at 54-55.

119. “Overcoming the legacy of slavery was the burning issue of the day and it eclipsed all others.” See Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1, 3 (1975).

120. Elizabeth F. Defeis, *Equity and Equality for Women—Ratification of International Covenants as a First Step*, 3 SETON HALL CONST. L.J. 363, 372 (1993) (referencing FLEXNER, *supra* note 109, at 142-43.). Defeis’ editorialized quote reads, “this was ‘the [male] Negro’s hour’” which is more apropos since freed female slaves were granted no benefit by the Fourteenth Amendment.

121. See CONCISE HISTORY, *supra* note 83, at 16-27.

122. See Paula F. Casey, *Tennessee’s Vote for Women Decided the Nation: The Final Battle*, 31 TENN. B.J. 20, 22-23 (1995).

123. See *United States v. Anthony*, 24 F. Cas. 829 (C.C.N.D.N.Y. 1873).

was subsequently arrested for violating a federal voting fraud statute.¹²⁴

Anthony's trial is an interesting study of one person taking on the system. At the trial, Anthony first objected to the absence of females on the jury.¹²⁵ In response she was told that the trial was being conducted "according to the established forms of law."¹²⁶ Anthony then stated:

Yes, your honor, but by forms of law all made by men, interpreted by men, administered by men, in favor of men, and against women; and hence . . . [a]s then the slaves who got their freedom must take it over, or under, or through the unjust forms of law, precisely so now must women, to get their right to a voice in this Government take it; and I have taken mine, and mean to take it at every possible opportunity.¹²⁷

The judge told Anthony he would hear no more.¹²⁸ The all male jury found her guilty.¹²⁹

Stanton's and Anthony's efforts continued throughout the end of the Nineteenth century, Mott had died in 1880.¹³⁰ Gradually, with the help of a newer alliance of middle-class working women,¹³¹ the reconfigured Suffrage Movement gained some reforms within the states.¹³² By the time the Nineteenth Amendment was ratified, a new generation of women activists emerged, including Dr. Anna Howard Shaw and Carrie Chapman Catt. Catt was the leader of the Suffrage Movement when the Nineteenth Amendment was ratified,¹³³ with Stanton having passed away in 1902¹³⁴ and Anthony in 1906.¹³⁵

124. See JOAN HOFF, *LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN* 153 (1991).

125. See MARY BECKER ET AL., *CASES AND MATERIALS ON FEMINIST JURISPRUDENCE* 11 (1994).

126. See HOFF, *supra* note 124, at 159.

127. 2 *HISTORY OF WOMEN SUFFRAGE* 687-88 (Elizabeth Cady Stanton et al. eds., 1881).

128. See HOFF, *supra* note 124, at 159.

129. See Nikolaus Benke, *Women in the Courts: An Old Thorn in Men's Sides*, 3 *MICH. J. GENDER & L.* 195, 219 (1995).

130. See SCOTT & SCOTT, *supra* note 75, at 11.

131. When women entered the World War I workforce, there was increased sentiment that women be given the right to vote. See FARBER & SHERRY, *supra* note 108, at 341.

132. See Shields & Buchko, *supra* note 117, at 1194-99. The eventual ratification of the Nineteenth Amendment was a combination of the works of the early suffragists, a passage of time and the participation of the media. Women began publishing newsletters and magazines in the mid-Nineteenth century that kept a nation apprised on what was happening within the movement and publicizing shared experiences. This created unity and more nationwide awareness. See FLEXNER, *supra* note 109, at 150-52. See also FARBER & SHERRY, *supra* note 108, at 341.

133. See KRADITOR, *supra* note 106, at 11-13.

134. See SCOTT & SCOTT, *supra* note 75, at 11.

135. See *id.*

THE ABSENCE OF THE SUFFRAGE MOVEMENT IN LEGAL HISTORY

Even contemporary legal texts do not treat the Suffrage Movement, and its many intersections with the formulation of Nineteenth century constitutional law, as a significant part of American legal history.¹³⁶ Legal history often includes reference to "Married Women's Property Acts" and acknowledgment of past legal disenfranchisement as integral, but the ninety-year Suffrage Movement is often reduced to a page that perhaps includes the 1848 Seneca Falls "Declaration of Sentiments."¹³⁷

By the same token, the treatment of the Abolition Movement, though it is regarded as important, shortchanges the contributions of females within the legal struggle.¹³⁸ Within our American legal history texts we will invariably find the Dred Scott decision.¹³⁹ Of the essays students read, one might find an essay written by Frederick Douglass and occasionally a reference to Harriet Beecher Stowe.¹⁴⁰ Students of history in general will be familiar with John Brown's raid on Harper's Ferry in 1859;¹⁴¹ however, few will recognize the names of Sarah and Angelina Grimke, both of whom embarked on an anti-slavery campaign in 1837.¹⁴²

History has found a way to separate Abolition from Women's Suffrage despite an almost synonymous identity between the two. History has also managed to convey to posterity that the anti-slavery campaign was a clash of men's political ideals when, in fact, it originated as a religious benevolent movement that was primarily female.¹⁴³ When males and females have engaged in activities on the same plane, one has been marginalized while the other heralded. Our legal texts and the view of history presented to students would give those students no reason to believe otherwise.

136. See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* (1997); DANIEL A. FARBER ET AL., *CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY* (1993); GERALD GUNTHER, *CONSTITUTIONAL LAW* (12th ed. 1991); DONALD E. LIVELY ET AL., *CONSTITUTIONAL LAW CASES, HISTORY AND DIALOGUES* (1996); WILLIAM B. LOCKHART ET AL., *CONSTITUTIONAL LAW: CASES, COMMENTS, QUESTIONS* (7th ed. 1991); GEOFFERY R. STONE ET AL., *CONSTITUTIONAL LAW* (3d ed. 1996).

137. See PRESSER & ZAINALDIN, *supra* note 4, at 545-49.

138. See, e.g., LIVELY ET AL., *supra* note 136, at 438; STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, *LAW AND AMERICAN HISTORY: CASES AND MATERIALS* 493 (1st ed. 1980).

139. *Id.*

140. See PRESSER & ZAINALDIN, *supra* note 4, at 545-49.

141. See E.D. HIRSCH JR. ET AL., *THE DICTIONARY OF CULTURAL LITERACY: WHAT EVERY AMERICAN NEEDS TO KNOW* 237, 244 (1988).

142. See LERNER, *supra* note 6, at 97-98.

143. See DUBOIS, *supra* note 84, at 31-47. See also ALMA LUTZ, *CRUSADE FOR FREEDOM: WOMEN OF THE ANTISLAVERY MOVEMENT* (1968).

PROTECTING SOCIETY FROM MYRA BRADWELL: THE SUPREME COURT REVISITED

The Supreme Court of the late Nineteenth century heard several cases that dealt with women's issues.¹⁴⁴ Each case could have conceivably given the Court the opportunity to make strides in equality that the legislatures had not made. One such significant lost opportunity was the case of Myra Bradwell.¹⁴⁵

Myra Bradwell was an Illinois woman who had followed all of the appropriate procedures in order to become an attorney.¹⁴⁶ She had engaged in the requisite legal apprenticeship and passed the Illinois bar exam.¹⁴⁷ Despite this, the Illinois bar refused to grant her a license. Their right to refuse the license was then validated by the Illinois courts.¹⁴⁸ The basis upon which Bradwell initially was not entitled to practice law was that Illinois law forbade married women from entering into contracts—i.e., Bradwell could not enter into legally binding contracts with clients.¹⁴⁹ However, the Illinois Supreme Court admitted that they would not allow Bradwell to practice law because she was a woman.¹⁵⁰ Subsequently, Bradwell appealed to the United States Supreme Court.¹⁵¹

Bradwell's attorney was Matthew Carpenter, a respected constitutional law lawyer who was an advocate of women's rights.¹⁵² Carpenter became

144. See *Ex parte Lockwood*, 154 U.S. 116 (1894); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874).

145. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872).

146. Bradwell is acknowledged as the first female attorney in the United States even though that is not entirely true. Arabella Mansfield was granted a law license in Iowa six weeks before Bradwell passed the Illinois bar; however, Mansfield did not practice law. Additionally, after Bradwell was refused admission to the bar, she never reapplied despite a change in the law that she helped institute. It was a *nunc pro tunc* entry made by the Illinois Supreme Court near the time of Bradwell's death that granted a "retroactive" license going back to the date Bradwell passed the bar exam. See JANE M. FRIEDMAN, *AMERICA'S FIRST WOMAN LAWYER* 11-30 (1993).

147. See *id.*

148. See *id.*

149. See *id.*

150. In reaching their decision, the Illinois Supreme Court first decided that the legislature's use of gender-neutral language within the statute declaring who could practice law meant that it was intended females be excluded rather than included. The court next concluded that if women were allowed to practice law, they might next want to hold other positions within government. Finally, the court commented that women within the law would destroy their "deference and delicacy" and that there would be an adverse effect on the administration of justice. *Id.* at 18-20, citing *In re Bradwell*, 55 Ill. 535-39 (1872).

151. Intriguingly enough, Bradwell, who was a renowned legal journalist and editor of the *Chicago Legal News*, had already helped craft and push for a statute that would allow women to practice law in Illinois. Had Bradwell reapplied a year after she was turned down, the Illinois Court would have been obligated to grant her license. See FRIEDMAN, *supra* note 146, at 21.

152. See *id.* at 22. Bradwell's attorney, Matthew Carpenter, sought a narrow victory—having the Court declare admission to practice by a woman a privilege and immunity. Carpenter conceded that for the purposes of the argument and given the language of the Four-

immersed in the project and argued eloquently before the High Court that the Privileges and Immunities Clause granted all persons an equal right to access the profession of law.¹⁵³ He also argued that it would be beneficial to the profession of law if clients could have a choice between male and female representation.¹⁵⁴ The State of Illinois, in response, apparently had nothing to say because it sent no opposing counsel.¹⁵⁵ Despite the one-sided argument, Bradwell lost eight to one.¹⁵⁶

*Bradwell*¹⁵⁷ is significant in women's legal history and within American Legal History for a variety of reasons. Obviously, it validated the perceived societal view that only men should engage in some professions—a societal view constructed by an exclusively male legal system and then validated by an exclusively male judicial system, despite the protestations of women for whom the rules were made. However, there is more to the decision than that. Within the Court's decision was not only a validly reasoned theory that deferred to state sovereignty, but an editorial commentary that demonstrated just how unrelenting the law would be when any underclass threatened the existing power structure.¹⁵⁸

The decision to seek certiorari in *Bradwell* was perhaps an appropriate and timely strategy to challenge what was then a male-dominated power base. Women were working towards acquiring the right to vote. Myra Bradwell was already a respected individual within the Illinois legal community.¹⁵⁹ If Bradwell succeeded in acquiring her license to practice law, there would have been much more potential for future female litigants to succeed on the basis of arguing inherent rights. It could have been a good start towards toppling some of the existing walls.

Whether purposeful or not, Justice Miller (writing for the majority) was able to keep women from "back dooring" the power base by upholding the prohibition against females practicing law in Illinois on the basis of state's rights.¹⁶⁰ Relying on the *Slaughterhouse Cases*,¹⁶¹ Justice Miller

teenth Amendment, the framers had not meant to ensure suffrage to women. Another interesting aspect of the Fourteenth Amendment construction is that neither counsel nor the Court gave any attention to the Fourteenth Amendment clause requiring equal protection of the law.

153. See Akhil Reed Amar, *Women and the Constitution*, 18 HARV. J.L. & PUB. POL'Y 465, 469-70 (1994).

154. See FRIEDMAN, *supra* note 146, at 24.

155. See Angel, *supra* note 97, at 267-68 for a discussion of *Bradwell* in the context of female oppression. Angel also discusses early Supreme Court decisions that reflected unequal applications of the law as applied to minorities. *Id.* at 268-72.

156. See FRIEDMAN, *supra* note 146, at 25-26.

157. 83 U.S. (16 Wall.) 130 (1872).

158. *Bradwell* likened the Illinois Supreme Court's decision to the Dred Scott case. See FRIEDMAN, *supra* note 146, at 21.

159. Carol D. Rasnic, Book Review, *America's First Woman Lawyer: The Biography of Myra Bradwell*, 4 TEX. J. WOMEN & L. 231, 235-38 (1995).

160. *Bradwell*, 83 U.S. at 131-39.

161. 83 U.S. (16 Wall.) 36 (1872).

acknowledged that females were citizens via interpreting the wording of the Constitution, but that state licensing of the practice of law was not controlled by the constitutional status of being a United States citizen.¹⁶² In this way, the Supreme Court deftly evaded any issue relating to female equality and established a precedent that would enable it to do the same when confronted with the suffrage issue and other cases in which women sought to enter the legal profession.¹⁶³

Justice Bradley's concurring opinion is another story.¹⁶⁴ The Supreme Court, by way of Justice Bradley, did not stop with issuing a legal opinion linked to the theory of state's rights.¹⁶⁵ Rather, the Supreme Court engrafted upon legal history stereotyped prejudices about the capabilities of women.¹⁶⁶ Only this time, the Court did not take on the role of protecting women from rigorous physical work, but rather from rigorous mental work.¹⁶⁷ Justice Bradley comments:

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.¹⁶⁸

Bradley does not stop there. After commenting on some legal principles that validated a lack of a woman's legal existence separate from her husband, Bradley continued by stating:

The humane movements of modern society, which have their object the multiplication of avenues for woman's advancement, and of occupations adapted to her condition and sex, have my heartiest concurrence. But I am not prepared to say that it is one of her fundamental rights and privileges to be admitted into every office and position, including those which require highly special qualifications and demanding special responsibilities. In the nature of

162. *Bradwell*, 83 U.S. at 139.

163. *See, e.g., Ex parte Lockwood*, 154 U.S. 116 (1894). In *Lockwood*, the plaintiff attempted to be admitted to the bar of Virginia on the basis of a state statute that provided, "Any person duly authorized and practicing as counsel or attorney at law in any state or territory of the United States, or in the District of Columbia, may practice as such in the courts of this state." *Id.* The Supreme Court held that the state was free to construe the term "any person" as limited to males because the ability to practice law was not a "privilege or immunity." *Id.* at 116-17.

164. *Bradwell*, 83 U.S. at 139-40.

165. *Id.* at 139.

166. *See* Laurie A. Keco, *The Citadel: Last Male Bastion or New Training Ground*, 46 CASE W. RES. L. REV. 479, 486 n.39 (1996).

167. *Bradwell*, 83 U.S. at 141-42.

168. *Id.* at 141.

things it is not every citizen of every age, sex, and condition that is qualified for every calling and position. It is the prerogative of the legislator to prescribe regulations founded on nature, reason and experience for the due admission of qualified persons to professions and callings demanding special skill and confidence.¹⁶⁹

No doubt Bradley had in mind "male" legislators who had the prerogative of deciding regulations founded on "nature, reason, and experience."¹⁷⁰ It would also seem that Bradley was of the opinion that practicing law was a vocation that required skills and confidence that only men were capable of.

Bradley's assessment was not maliciously intended, but based on a protectionist philosophy.¹⁷¹ He may have sincerely believed that prohibiting women from practicing law was protecting them from the rigors of the profession when their temperament and physical features were more suited for the domestic sphere; however, with such brotherly protection, one would have to wonder whether women would be allowed any personally chosen accomplishment at all, or whether they would be recognized if and when they did have such achievement. In response to like attitudes, abolitionist and suffragette Lucy Stone commented with frustration, "Too much has already been said and written about woman's sphere Leave women, then, to find their sphere"¹⁷² It is unlikely that Justice Bradley was familiar with Stone's career at the time. In fact, Stone had established her own career and made the comment twenty years *prior* to the *Bradwell* decision.¹⁷³

" . . . THESE ARE RARE ATTAINMENTS FOR A DAMSEL, BUT PRAY TELL ME, CAN SHE SPIN?"¹⁷⁴: SETTING THE STAGE FOR PREJUDICE IN THE CLASSROOM

Most certainly, if would-be attorneys who are men are never confronted with a female authority figure or confronted with the reality of bright, articulate females in class or within legal history they will never be able to develop much respect for females as competent adversaries or even superiors.¹⁷⁵ This makes Justice Bradley's opinion much more damning

169. *Id.* at 142.

170. *Id.*

171. It is intriguing to note that the "natural law" commented upon by the Supreme Court did, in no way, benefit slaves, not even the African-American female. Sojourner Truth, a slave for forty years commented, "Nobody ever help me into carriages or over mud puddles or gives me any best place—and aren't I a woman?" See LERNER, *supra* note 6, at 99 (quoting NARRATIVE OF SOJOURNER TRUTH 134 (Battle Creek, 1884)).

172. HISTORY OF WOMAN SUFFRAGE, *supra* note 81, at 165.

173. *See id.*

174. James I, upon being introduced to a woman proficient in Latin, Greek, and Hebrew. MACMILLAN DICTIONARY OF QUOTATIONS, *supra* note 70, at 617.

175. Alice de Rivera (commenting on high schools) stated, "A boy who has never worked

than it otherwise might have been. It was a perception of women's inferiority which was validated by the highest Court in the land, a perception that took on a life of its own as the 1800s drew to a close.

Legal scholarship near the time period during which the Nineteenth Amendment was ratified reflects this view. One student writing for the Virginia Law Review concluded that women were legally excluded from juries, not on the basis of prejudice, but "in the best interest of the community."¹⁷⁶ A second note written by another student at the University of Virginia assessed that if all women gained suffrage, a "mass" of Negro women would be added to the electorate, "most of whom would be wholly lacking the character and qualifications which alone fit a citizen for the art of self-government."¹⁷⁷ A Columbia law student presumably assumed only men could be geniuses, but otherwise conceded that, "[W]omen, if similarly trained, could generally compete on an equal footing with men."¹⁷⁸ Finally, one author, commenting on the debate as to whether women should serve on juries, stated, "Man has few enough rights left without impairing his age old right to a warm dinner, subject only to the equally ancient qualification of his spouse to prepare it."¹⁷⁹

The notion of the importance of a "men's only" legal history extended beyond law review articles. An excerpt from the book jacket summary of Rene A. Wormser's 1949 novel, *The Story of the Law and the Men Who Made It*¹⁸⁰ reads:

For *The Story of the Law* tells the entire history of man's search for justice and of the great men who led that search throughout the long process of evolution of which our own democracy is the end product.

The creation of laws involves far more than just the work of legislators. Religious and military leaders, philosophers, presidents, dictators, and fanatics have all played their part. So the pages of

with a girl in the classroom is bound to think of her as his intellectual inferior, and will not treat her as if she had capacity for understanding things other than child-care and homemaking." Alice de Rivera, *On Desegregating Stuyvesant High*, in *SISTERHOOD IS POWERFUL* 366, 371 (Robin Morgan ed., 1970). This is also appropriate with respect to legal education.

176. Note, *Constitutionality Under the Fourteenth Amendment and the Proposed Nineteenth Amendment of State Laws Limiting Jury Service to Male Citizens*, 6 VA. L. REV. 589, 591 (1920).

177. Emmet O'Neal, *The Susan B. Anthony Amendment: Effect of Its Ratification on the Rights of the States to Regulate and Control Suffrage and Elections*, 6 VA. L. REV. 338, 357 (1920).

178. Note, *Current Legislation, Equalizing the Legal Status of the Sexes*, 21 COLUM. L. REV. 712 (1921).

179. Angel, *supra* note 97, at 274 n.359 (quoting *Women Jurors*, 26 LAW NOTES 224 (1923)).

180. RENE A. WORMSER, *THE STORY OF THE LAW AND THE MEN WHO MADE IT—FROM THE EARLIEST TIMES TO THE PRESENT* (1949).

The Story of the Law are filled with the names and deeds of famous men in many areas¹⁸¹

Wormser meant what he said. There is not one woman highlighted in the book. Whether purposeful or inadvertent, Wormser limits the major "equality" issues in the Nineteenth century to "Law for the Poor Man,"¹⁸² "Equality for the Negro,"¹⁸³ "Equality for the Indian,"¹⁸⁴ and "Equality for Orientals."¹⁸⁵ There is only one sentence relating to Women's Suffrage.¹⁸⁶ Other historical works of the period are similarly bereft of any reference to women,¹⁸⁷ as are Supreme Court decisions relating to other forms of inequality.¹⁸⁸ While the melting pot composition of the United States seemingly made it important to highlight unacceptable prejudices towards groups such as "Celtic Irishmen,"¹⁸⁹ it was as late as 1961 that the Supreme Court was still proclaiming that women could, and perhaps should, be kept off of juries because of their domestic responsibilities.¹⁹⁰

"NO MATTER WHAT YOUR FIGHT, DON'T BE LADYLIKE!"¹⁹¹: THE STORY OF MOTHER JONES

Not all women of historical note were frustrated graduates of a university, products of unconventional upbringing, philanthropic ladies of leisure working for great humanitarian pursuits¹⁹² or thwarted professionals. Many women placed themselves at the heart of controversy simply because it was the right "sphere" for them at the time. Their historical significance is seemingly acknowledged within different realms, such as within 'Women's Studies.' However, in the larger scheme of things, such women have become invisible while their male contemporaries are spotlighted on

181. *Id.* (quote from book jacket).

182. *Id.* at 384.

183. *Id.* at 405.

184. *Id.* at 408.

185. *Id.* at 409.

186. It reads, "On the credit side, the *Nineteenth Amendment*, giving women the right to vote, was enacted during Wilson's regime, after a long suffragette struggle marked by bitterness and ridicule." *Id.* at 429.

187. See, e.g., *AMERICAN CONSTITUTIONAL HISTORY: ESSAYS BY EDWARD CORWIN* (Alpheus T. Mason & Gerald Garvey eds., 1964).

188. See, e.g., *Gibson v. Mississippi*, 162 U.S. 565 (1896) (race); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (discrimination against Chinese); *Soon Hing v. Crowley*, 113 U.S. 703 (1885); *Bush v. Commonwealth of Kentucky*, 107 U.S. 110 (1883); *Neal v. Delaware*, 103 U.S. 370 (1881) (race); *Strauder v. West Virginia*, 100 U.S. 303 (1879) (race).

189. See *Strauder*, 100 U.S. at 305.

190. See *Hoyt v. Florida*, 368 U.S. 18 (1961).

191. MARY HARRIS JONES, *THE AUTOBIOGRAPHY OF MOTHER JONES* 204 (1925) [hereinafter *AUTOBIOGRAPHY*].

192. See *BOULDING*, *supra* note 2, at 625-60.

the historical stage. Mother Jones was one of these rare women given some attention, albeit in marginalized studies.

Mary Harris (Mother) Jones was born (she claimed) in 1830, an immigrant from Cork, Ireland.¹⁹³ She was originally a teacher, but by 1861 she was married with four children.¹⁹⁴ In 1867, Jones lost her husband and all four children to yellow fever.¹⁹⁵ She moved to Chicago and turned to the Knights of Labor in 1871 when the Chicago fire left her without possessions.¹⁹⁶ In 1880, at the age of fifty, Mother Jones became a full-time labor activist.¹⁹⁷ At first, her only involvement was telling people in the area to join with the union in order to gain better working conditions; however, when the Knights recognized what an impassioned advocate she was, they asked that she advocate their cause on a more widespread basis.¹⁹⁸ With the support of the Knights, advocating the rights of laborers became Jones' lifetime dedication.¹⁹⁹

After a seventeen-year career as a labor advocate, Jones became a full-time organizer for the United Mine Workers.²⁰⁰ It was as an organizer of mine workers that Jones first gained national fame. Wherever there were strikes or organizing movements, Jones was there, encouraging the miners, offering her support and being ornery towards any of the company men who tried to dissuade her from her mission.²⁰¹ She taunted company workers to "shoot an old woman" if they dared and boldly did all she was forbidden to do.²⁰² Risking arrest and even potential assassination everywhere she went, Jones' ability to inspire laborers stemmed both from her audacity and her willingness to live in the same conditions as the workers. Even though over sixty, she hiked the West Virginia mountains, slept in the dirt and did without food when there was none for others.²⁰³

Jones' activities were not restricted to the United Mine Workers. In time, Jones became involved wherever there were workers she thought were being treated unfairly. In the 1890s she became active in organizing the Textile Workers' Union and worked towards eliminating the exploitation of child labor.²⁰⁴ She had ideas for publicity that were innovative and

193. See AUTOBIOGRAPHY, *supra* note 191, at 11.

194. See *id.*

195. See *id.* at 12.

196. See *id.*

197. See *id.* at 13-17.

198. See JUDITH PINKERTON JOSEPHSON, MOTHER JONES: FIERCE FIGHTER FOR WORKER'S RIGHTS 32 (1997).

199. See *id.* at 39.

200. See *id.* at 95.

201. See *id.* at 105-19.

202. LINDA ATKINSON, MOTHER JONES, THE MOST DANGEROUS WOMAN IN AMERICA 84 (1978).

203. See JOSEPHSON, *supra* note 198, at 62-63.

204. See ATKINSON, *supra* note 202, at 114-33.

were guaranteed to make the general public aware of the workers' plight. In 1903 she organized child laborers for a twenty-two day march from Kensington, New Jersey to President Theodore Roosevelt's summer home on Long Island.²⁰⁵ Along the way, she held demonstrations and used the press to her advantage by showing them the mutilated hands of the child workers.²⁰⁶ By the time she finished the march, there were few people who were not aware of what was happening to children in the textile industry.²⁰⁷

Jones next worked with the Mine Workers in Colorado. Disguised as an old peddler, she was able to investigate the conditions of the workers and report on such conditions to union officials.²⁰⁸ After Colorado, Jones' path intersected with the Western Federation of Mineworkers and then with Bill Haywood, of the International Workers of the World.²⁰⁹ Near the age of eighty, Jones rallied for railroad workers, copper miners and women bottlers in Wisconsin.²¹⁰ While encouraging striking miners in Paint Creek and Cabin Creek, West Virginia, Jones' ended up being court-marshalled before a military tribunal and sentenced to twenty years in prison.²¹¹ After a public outcry, Jones was released in three months.²¹²

Mary Harris Jones lived to be one hundred and did not slow down until the very end of her life.²¹³ She never really lived anywhere and often carried her possessions with her.²¹⁴ Most of the money she acquired she gave to others.²¹⁵ Within this lifestyle Jones gained enough notoriety and influence to be consulted by politicians and company representatives who wanted to prevent unrest from turning into labor violence.²¹⁶ Jones advocated strikes and organization as a means to remedy the disparity between the haves and the have-nots.²¹⁷ Within her activism she never differentiated between men and women. Indeed she believed that women (and perhaps even children) were more useful on the picket line than were men. She advocated whatever it took to get things done and refused to bow down to convention or power. For Jones it was simply the right thing to do.²¹⁸

205. *See id.* at 120.

206. *See id.*

207. *See id.* at 133.

208. *See id.* at 138-39.

209. *See id.* at 158-62.

210. *See id.* at 167.

211. *See* THE COURT-MARTIAL OF MOTHER JONES (Edward M. Steel Jr. ed., 1995) [hereinafter COURT-MARTIAL].

212. *See* JOSEPHSON, *supra* note 198, at 115.

213. *See* ATKINSON, *supra* note 202, at 226-34.

214. *See* JOSEPHSON, *supra* note 198, at 62-63.

215. *See id.* at 63.

216. *See id.* at 13, 125, 129-30.

217. *See* ATKINSON, *supra* note 202, at 100.

218. *See* JOSEPHSON, *supra* note 198, at 136.

THE ABSENCE OF MOTHER JONES WITHIN LABOR STUDY

"Mother Jones is one of the most forceful and picturesque figures of the American labor movement," Clarence Darrow comments in his Introduction to the *Autobiography of Mother Jones*.²¹⁹ Called the "most dangerous woman in America,"²²⁰ she was one of the most well-known labor activists of her time. It is remarkable that she has receded into the invisible vapors of both legal and nonlegal history. Jones—a contemporary and friend of both Eugene Debs and Clarence Darrow—has vanished, while the other two have become rooted within our collective consciousness as monuments to dedication and fairness.²²¹ Jones faded away, while men of similar, if not lesser, achievements gained recognition. Debs, a member of the Socialist party, became associated with the Pullman train strike²²² and the cause of the common man; however, few people recall Jones' contributions to the Labor Movement.²²³ Fewer still would know that Jones was instrumental in establishing the International Workers of the World.²²⁴

It is a curious interpretation of what is historically noteworthy. While one biographer writes that Jones remains relatively unknown because there was little written about her,²²⁵ there seems to be no lack of information on Jones within books that detail women left out of history.²²⁶ One reason for excluding Jones' contributions appears to be that the individuals writing legal history deemed her male contemporaries more worthy of inclusion. Another reason might very well be that the study of our country's legal development, which seems only to acknowledge legal history derived through published cases, leaves out influential individuals about whom our highest courts have never had the opportunity to comment.²²⁷

219. AUTOBIOGRAPHY, *supra* note 191, at xxi.

220. JOSEPHSON, *supra* note 198, at 105; ATKINSON, *supra* note 202, at 1.

221. A Westlaw search conducted on Sept. 4, 1998 of the TP-ALL database discovered two articles of substance on the work of Mother Jones. See, e.g., John M. Husband, *The Colorado Coal Wars of 1913 and 1914: Some Issues Still Debated Today*, 26 COLO. LAW. 147 (1997); William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109 (1989). A search of the terms "Eugene Debs" and "Clarence Darrow" yielded 105 and 439 results respectively.

222. See Forbath, *supra* note 221, at 1161.

223. See *supra* note 221.

224. See COURT-MARTIAL, *supra* note 211, at 3-4.

225. See JOSEPHSON, *supra* note 198, at 7.

226. See BOULDING, *supra* note 2, at 641. See generally HERSTORY, *supra* note 12.

227. This, in fact, might be a kind overstatement. Harriet Scott's suit for freedom simply disappeared in the wake of her husband's case. She was certainly a part of American legal history and part of an important constitutional law case that is studied in every Constitutional Law class in the country but she is somehow left out both then and now. See Leslye M. Huff, *Deconstructing Sodomy* 22-34 (unpublished manuscript, on file with the author). While there might be some justification for ignoring Mother Jones because she was not a part of traditional legal history (e.g., case law study), there is not a similar justification for what has happened with Harriet Scott.

WOMEN AND THE SOCIALIST MOVEMENT

The intersection between women's equality issues, labor issues and Socialism should come as no surprise to the astute observers of history.²²⁸ The Socialist movement was gaining momentum in Europe and in the United States.²²⁹ In the late Nineteenth century there seemed no other avenue of redress for the factory and mineworkers.²³⁰ Women associated themselves with the Socialist movement, much as they had done with the Abolitionist Movement—partially for benevolent reasons, partially because women recognized themselves as an oppressed class.²³¹

This liaison took an interesting turn in connecting itself with mainstream constitutional theory in the early Twentieth century in the case of *Whitney v. California*.²³² *Whitney* involved the constitutional challenge of California's Syndicalism Law which, in simplified terms, criminalized speech related to anti-government sentiments or activities.²³³ Because there was an overall suspicion of Socialism and its relationship to revolution and anarchy, many Socialist activities (including merely organizing) were deemed violations of this law.²³⁴

Anita Whitney, the defendant in the case, was a fifty-two year old woman—a philanthropist—who was an admitted member of the Communist Party and an individual who advocated peaceful labor reform.²³⁵ She was arrested after appearing at an International Workers of the World convention. The International Workers of the World was known for advocating violence, and it was upon this premise that Whitney was prosecuted,

228. For a discussion of the intersection between labor and free speech issues, see Geoffrey D. Berman, *A New Deal for Free Speech: Free Speech and the Labor Movement in the 1930's*, 80 VA. L. REV. 291 (1994).

229. See BOULDING, *supra* note 2, at 625-28.

230. See *id.*

231. See *id.* at 627-28.

232. 274 U.S. 357 (1926).

233. For a discussion of the history of speech protections, prohibitions, and the genesis of the syndicalism laws, see ZECHARIAH CHAFEE JR., *FREE SPEECH IN THE UNITED STATES* (1941). Chafee was a known scholar of First Amendment jurisprudence during the early part of the Twentieth century. His 1941 book was a rewrite of the original, cited in *Whitney*, 274 U.S. at 376, nn.4-5.

234. The pertinent part of the Syndicalism Act under which Whitney was prosecuted reads, "Any person who . . . organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach, or aid and abet criminal syndicalism . . . is guilty of a felony . . ." *Whitney*, 274 U.S. at 359. Syndicalism itself was defined as

any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage [hereby defined as meaning willful and malicious physical damage or injury to physical property], or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control or effecting any political change.

Id.

235. See CHAFEE, *supra* note 233, at 343-44.

and eventually convicted, for violating the criminal syndicalism law.²³⁶ After an appellate process that took nearly seven years, the United States Supreme Court ultimately granted certiorari.²³⁷

The *Whitney* decision is now regarded as one of the most important cases in our study of First Amendment jurisprudence.²³⁸ It was within that decision that both Justice Brandeis (writing the concurrence) and Justice Holmes crafted the philosophy which would be the foundation of our modern understanding of First Amendment protections—that “to be afraid of ideas, any idea, is to be unfit for self-government.”²³⁹ Whitney, herself, did not fare so well in the majority’s opinion (although she had been pardoned); the Court determined that the statute did not violate either the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment.²⁴⁰ The Court opinion stated that the statute was not vague or ambiguous and added that a state was entitled to enact legislation aimed at eradicating what “it deems to be an existing evil.”²⁴¹ Although suit was not brought specifically on First Amendment grounds, the Court did reiterate the holdings of its most recent speech cases to the effect that free speech was a “liberty” restricting state power.²⁴² Nevertheless, the Court opinion declared that “[f]reedom of speech secured by the Constitution does not confer an absolute right to speak, without responsibility, whatever one may choose, or an unrestricted and unbridled license, giving immunity for every possible use of language, and preventing punishment of those abusing this freedom.”²⁴³

Justice Brandeis concurred with the Court’s judgment. However, he based his concurrence on the belief that the defendant had waived her right to have basic speech issues reviewed.²⁴⁴ Nonetheless, he strongly disagreed with the majority’s interpretation of what would be protected speech.²⁴⁵ Brandeis’ concurrence in *Whitney* has since become the cornerstone of modern First Amendment jurisprudence. It was the first proclamation that the right to criticize one’s government emanated from the intentions of the founding fathers. Until that point, there had been no

236. For a history of Anita Whitney and the background of the case, see Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653, 655-58 (1988).

237. *See id.* at 663.

238. *See id.* at 671-72.

239. ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 28 (1960).

240. *See* CONGRESSIONAL QUARTERLY’S GUIDE TO THE U.S. SUPREME COURT 401, 402 (Elder Witt ed., 2d ed. 1990).

241. *Whitney*, 274 U.S. at 370.

242. *Id.* at 371-72.

243. *Id.* at 371.

244. *Id.* at 380.

245. *Id.* at 373-79.

consensus on what the nation's founding leaders intended, and laws restricting speech were routinely passed within the states.²⁴⁶

Despite *Whitney's* significance, Anita Whitney and any socialist cause she may have originally had has slipped into an historical void. While *Whitney* is often studied for its concurrence, its intersection with other issues, such as labor reform and women's equality, is rarely acknowledged. Moreover, while Anita Whitney, a female, makes her appearance as a lead character who stealthily slips into the annals of constitutionally significant case law, her "appearance" has quite obviously become overshadowed by the perceived "accomplishment" and innovation of Louis Brandeis.²⁴⁷ Over a thousand law review articles have been written referencing Brandeis' First Amendment philosophies;²⁴⁸ not one has been written on Anita Whitney, or more appropriately, what Whitney represented: the influence of women on the developing jurisprudence of this country.²⁴⁹

"SO WE BEAT ON, BOATS AGAINST THE CURRENT, BORNE BACK
CEASELESSLY INTO THE PAST"²⁵⁰; WOMEN'S STRUGGLE FOR
INSTITUTIONAL RECOGNITION

If we, as legal educators, open up most of our own textbooks and look for references to the significant achievements of women throughout the course of legal jurisprudential development during the Nineteenth and early Twentieth centuries, we will find scarce few.²⁵¹ If we try to gauge the contributions of women to developing constitutional theory during this same time frame within these texts, we will find it sparse. Although "progressive" thinking within the legal academy in recent years has begun to reconsider some of this historical marginalization,²⁵² there is still a fundamental problem in what legal history is presented to our students, and how it is presented. It is not that women within legal history remain totally unacknowledged; it is that law schools tend to separate out those achievements as if they belong to a distinct realm, "women's" history or

246. See generally Blasi, *supra* note 236.

247. A Westlaw search conducted on September 8, 1998 in the TP-All database revealed 265 articles with a reference to the "Brandeis Brief."

248. A Westlaw search conducted on September 8, 1998 in the TP-All database revealed 1041 articles making reference to Louis Brandeis and the First Amendment.

249. A Westlaw search conducted on September 8, 1998 in the TP-All database revealed 14 total references to "Anita Whitney." This includes passing references.

250. F. SCOTT FITZGERALD, *THE GREAT GATSBY* 182 (1925).

251. See *supra* note 136.

252. A growing number of law schools offer electives in "Feminist Jurisprudence" and "Women and the Law." While much of this study is not regarded as mainstream legal education, it does allow students the opportunity to learn about issues that are not otherwise taught. See generally Anita Bernstein, *A Feminist Revisit to the First-Year Curriculum*, 46 J. LEGAL EDUC. 217 (1996).

"women's" law.²⁵³ This separation is apparent within the newly developed courses, as well as within revised substantive texts that segregate a perceived female issue, or a "feminist" approach to law, from the entirety of mainstream legal study.²⁵⁴

Special courses about "women's" achievements and influence, however well intended, send the wrong message—women's achievements, such as they are, are different, less important and on the periphery of America's legal stage.²⁵⁵ Women's achievements are already in existence within the universal human history.²⁵⁶ What needs to be done is to diagnose and cure the institutional perpetuation that "male" historical influence, especially within Constitutional Law, is more noteworthy than "female" historical influence.

Gender integration of both law schools and the legal profession are often proclaimed to be of recent vintage; however, it is debatable as to whether this is really true.²⁵⁷ Additionally, it remains unclear whether law schools, institutionally, have yet to face up to the fact that the standard curriculum still marginalizes female influence on jurisprudential development.²⁵⁸ As early as 1971, Ruth Bader Ginsburg, then teaching at Rutgers, lamented the lack of female representation within law school curriculum.²⁵⁹ Nearly thirty years later, the same deficiencies arguably still exist. Each year, standard casebooks by the "recognized" legal experts tend to be

253. See *id.* (discussing the integration of feminist issues within a first-year curriculum).

254. Teaching methods mirror this stratification, at least in terms of perception. While the teaching of Labor Law, Constitutional Law, Contracts and other required substantive courses rely primarily on the casebook method and are expected to be cold, logical and serious, courses such as "Gender Discrimination," and "Women in the Law" often convey to the student a lax atmosphere before a female professor who will be teaching a course regarded as peripheral to the Academy's main mission. See generally Christine Haight Farley, *Confronting Expectations: Women in the Legal Academy*, 8 YALE J. L. & FEMINISM 333 (1996).

255. In writing a supplemental casebook for Constitutional Law courses, Justice Ruth Ginsburg commented:

The new direction toward equal rights and responsibilities for women and men as constitutional principle is a development likely to affect the professional and social lives of all law students; it is a matter too important to be compartmentalized for treatment only in specialized courses with limited enrollment.

RUTH BADER GINSBURG, TEXTS, CASES AND MATERIALS ON CONSTITUTIONAL ASPECTS OF SEX-BASED DISCRIMINATION III (1974).

256. See Linda Gordon, *What's New in Women's History*, in A READER IN FEMINIST KNOWLEDGE 73-75 (Sneja Gunew ed., 1991).

257. See generally Ruth Bader Ginsburg, *Women's Work: The Place of Women in Law Schools*, 32 J. LEGAL EDUC. 272, 273 (1982) (quoting CURTIS J. BERGER, LAND OWNERSHIP AND USE: CASES STATUTES AND OTHER MATERIALS (1968)).

258. Presser and Zainaldin's first edition of their law and American history text (published in 1980) has no reference to any female-oriented legal issues, including Suffrage. See PRESSER & ZAINALDIN, *supra* note 138.

259. See Ruth Bader Ginsburg, *Treatment of Women by the Law: Awakening Consciousness in The Law Schools*, 5 VAL. U. L. REV. 480, 484 (1971).

assigned.²⁶⁰ These may be revised and edited, maybe adding a segment incorporating a previously excluded women's issue.²⁶¹ Yet there seemingly continues to be acceptance of the major gender premises implicit in the works.²⁶²

Although cases are represented more-or-less as inanimate pieces of logic within the legal development of this country, it is a mistake to believe that they are gender-less.²⁶³ The law presented to our students is that developed by males within a male society emphasizing the achievements of men during whatever historical time period is being represented.²⁶⁴ The traditional course of study has been limited primarily to constitutions, codes and cases. These were, by virtue of what was happening historically, written devices of the male-empowered legal system. If our study is limited primarily to these devices, we will relegate our students to studying a masculine legal historical development.

As a consequence, leaving out essays and other writings from our substantive texts precludes a large amount of female representation within legal history. Many contemporary Constitutional Law texts now include sources, other than cases, with greater representation of female scholars.²⁶⁵ However, the bulk of writings by female authors tend to appear in the

260. Publishers Aspen Law and Business (formerly Little & Brown) describes *Constitutional Law* by Stone et.al, *supra* note 136, as "phenomenally popular." ASPEN LAW & BUSINESS, LAW SCHOOL PUBLICATIONS 1997 15 (1997) (promotional literature, on file author). Farnsworth's and Young's Contracts text is in its fifth edition and has been adopted at over one hundred law schools. See Geoffrey R. Watson, Casebook Review, *A Casebook For All Seasons?*, 20 SEATTLE U. L. REV. 277, 277 (1997). Prosser on Torts, now in its ninth edition, is reported by Foundation Press to be its most popular Torts text. Interview with Foundation Press (June 13, 1997).

It is not my intention to claim that these texts are not good; I would, however, like to point out the reluctance of the legal academy as a whole to change any aspect of itself. If there is never a demand for a different form of presentation made to publishers, the same texts will be supplied from year to year, or at least the same format of the texts. There would be neither a need for publishers to modify their offerings, nor would there be a need for aspiring book authors to attempt anything stylistically different. Current teaching methodology is, in a sense, perpetuated by economic feasibility.

261. See, e.g., PRESSER & ZAINALDIN, *supra* note 4, at 545-69, 999-1033.

262. Mary Joe Frug has written about how textbooks may subtly perpetuate male dominance in law by the material selected and the means for presentation selected. Frug points to an overrepresentation of male plaintiffs, cases that feature situations with stereotypical roles, and the judicial characterization of featured females within the opinions. See Mary Joe Frug, *Rereading Contracts: A Feminist Analysis of A Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985).

263. See Frances Olsen, *The Sex of Law*, in THE POLITICS OF LAW 453, 454 (David Kairys ed., 1990).

264. Frances Olsen comments, "[A]ccording to dominant ideology, law is male, not female. Law is supposed to be rational, objective abstract, and principled, as men claim they are; it is not supposed to be irrational, subjective, contextualized, or personalized, as men claim women are." *Id.* at 454. For a discussion of men as rational and logical, see CAROL GILLIGAN, IN A DIFFERENT VOICE (1982).

265. See, e.g., *supra* note 136.

context of a gender-related discussion.²⁶⁶ The majority of venerated constitutional law "scholars" are overwhelmingly male.²⁶⁷ Although there were many prolific female authors in the Nineteenth century who wrote eloquently about contemporary issues, their work usually does not appear in our legal texts.²⁶⁸ This is, no doubt, because their work was not, and is still not, considered traditional legal scholarship that could be used in conjunction with the case method of study.

To that end, there is no denying Constitutional Law texts include mention of most Supreme Court cases dealing with female litigants or female rights issues during the Nineteenth and early Twentieth centuries.²⁶⁹ It is intriguing, however, that few people would recall these cases, let alone their significance within legal history. This is primarily because their manner of presentation does not make them particularly memorable or significant.

For instance, most Constitutional Law texts present *Muller v. Oregon*

266. Although it is often difficult to tell the gender of the author within the texts that use essays and book excerpts for sources, the lengthiest footnotes listing secondary authority appear within the Equal Protection—Gender Discrimination sections of the text. It is within these sections that the most familiar female authors (such as, Catherine MacKinnon, Andrea Dworkin, Patricia Williams, Frances Olsen, Rebecca West and Deborah Rhode) appear. See LIVELY ET AL., *supra* note 136, at 633-73; LOCKHART ET AL., *supra* note 136, at 1339-49; STONE ET AL., *supra* note 136, at 728-30. Stone includes a section on pornography and the victimization of women that cites secondary references authored by women. See STONE ET AL., *supra* note 136, at 1317-22.

267. See LOCKHART ET AL., *supra* note 136, at 1-75; STONE ET AL., *supra* note 136, at xxxv-xxxviii. See also MICHAEL J. GLENNON ET AL., A CONSTITUTIONAL LAW ANTHOLOGY xi-xvi (2d ed. 1997).

268. The writings include, books, essays, letters and addresses written by females during the Nineteenth century. Although there are too many to mention specifically, these include JANE ADDAMS, DEMOCRACY AND SOCIAL ETHICS (1907); JANE ADDAMS, THE HOUSING PROBLEM IN CHICAGO (1902); Address of Angelina Grimke to the National Anti-Slavery Convention, CONCISE HISTORY, *supra* note 83, at 73-77; Address of Victoria Woodhull to the Judiciary Committee, SCOTT & SCOTT, *supra* note 75, at 75-80; Appeal and Petition for a Sixteenth Amendment, CONCISE HISTORY, *supra* note 83, at 304-06; TENNESSEE C. CLAFLIN, CONSTITUTIONAL EQUALITY (Hyperion, 1976) (1871); Margaret Fuller, *The Great Lawsuit. Man versus Men: Women versus Women (Woman in the Nineteenth Century)*, in MARGARET FULLER: ESSAYS ON AMERICAN LIFE AND LETTERS 82 (Joel Myerson ed., 1978) (first printed in 1875); Matilda Joslyn Gage, *Preceding Causes*, CONCISE HISTORY, *supra* note 83, at 51-68; CHARLOTTE PERKINS GILMAN, WOMEN AND ECONOMICS (1898); SARAH A GRIMKE, LETTERS ON THE EQUALITY OF THE SEXES, AND OTHER ESSAYS (Elizabeth Ann Bartlett ed., 1988); BELLE KEARNEY, A SLAVEHOLDER'S DAUGHTER (1900); Louisa S. McCord, *Enfranchisement of Woman*, in THE AMERICAN INTELLECTUAL TRADITION: 1630-1865, at 403 (David A. Hollinger & Charles Capper eds., 1997); Elizabeth Cady Stanton, *The Politics of Woman Suffrage*, 2 HISTORY OF WOMAN SUFFRAGE, *supra* note 127, at 348-55; MERCY OTIS WARREN, HISTORY OF THE RISE, PROGRESS AND TERMINATION OF THE AMERICAN REVOLUTION (Lester H. Cohen ed., 1988); FRANCES WRIGHT, COURSE OF POPULAR LECTURES (1829). For a lengthy bibliography containing historical materials about women's historical influences, see MARY BEARD, WOMAN AS FORCE IN HISTORY 341-69 (1946).

269. See *supra* notes 55, 57, 59, 114, 143, 231.

as a note case following *Lochner v. New York*.²⁷⁰ It is generally lumped together with *Bunting v. Oregon*,²⁷¹ possibly *Adkins v. Children's Hospital*,²⁷² and "Yellow Dog" contracts preventing unionization.²⁷³ There generally is a short discussion about *Muller* and the subject of "female" labor and invariably a mention of the "Brandeis Brief,"²⁷⁴ statistically highlighting female "delicacies."²⁷⁵ One might ask whether this is not a significant acknowledgement for females existing within legal history, at least in a realistic sense. I would pose that it is not.

Aside from the fact that Louis Brandeis has probably become the most memorable part of *Muller*,²⁷⁶ the usual presentation of *Muller* trivializes female influence. As a note case, it would seem to give the indication that it is not very significant. Additionally, any included quotation that references "female delicacies" makes it evidently a case about gender. Its relation to *Lochner* and the Court's overall historic views on judicial legislation and freedom to contract are rarely acknowledged apart from the gender aspect.²⁷⁷ Moreover, Justice Sutherland's contradictory opinions in *Adkins* and *Radice v. New York*, and their relation to Justice Brewer's opinion in *Muller* are never discussed at length despite the universal acknowledgment that *Lochner* was followed by a lengthy period of contradictory case law.²⁷⁸

Myra Bradwell appears to have been relegated to a similar fate as that of *Muller*. While Bradwell's case has often become a staple of contemporary Constitutional Law texts, if included, it generally heads up the section on Gender Discrimination.²⁷⁹ While it cannot be denied that *Bradwell* is

270. See, e.g., CHEMERINSKY, *supra* note 136, at 483; WILLIAM COHEN & JONATHAN D. VARAT, CONSTITUTIONAL LAW: CASES AND MATERIALS 522-23 (9th ed. 1993); GUNTHER, *supra* note 136, at 445; LOCKHART ET AL., *supra* note 136, at 352; RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW 349-51 (4th ed. 1993); STONE ET AL., *supra* note 136, at 825, 830.

271. See, e.g., CHEMERINSKY, *supra* note 136, at 483-84; COHEN & VARAT, *supra* note 270, at 512; GUNTHER, *supra* note 136, at 445; LOCKHART ET AL., *supra* note 136, at 352; ROTUNDA, *supra* note 270, at 350; STONE ET AL., *supra* note 136, at 830.

272. See, e.g., COHEN & VARAT, *supra* note 270, at 523; LOCKHART ET AL., *supra* note 136, at 352; ROTUNDA, *supra* note 270, at 351; STONE ET AL., *supra* note 136, at 830.

273. See, e.g., COHEN & VARAT, *supra* note 270, at 512; LOCKHART ET AL., *supra* note 136, at 352; STONE ET AL., *supra* note 136, at 830.

274. See, e.g., CHEMERINSKY, *supra* note 136, at 483; COHEN & VARAT, *supra* note 270, at 522; FARBER ET AL., *supra* note 136, at 302; LOCKHART ET AL., *supra* note 136, at 352; ROTUNDA, *supra* note 270, at 349-50; STONE ET AL., *supra* note 136, at 825.

275. See, e.g., COHEN & VARAT, *supra* note 270, at 522; ROTUNDA, *supra* note 270, at 350; STONE ET AL., *supra* note 136, at 825.

276. See, e.g., CHEMERINSKY, *supra* note 136, at 483.

277. See, e.g., STONE ET AL., *supra* note 136, at 825.

278. See, e.g., CHEMERINSKY, *supra* note 136, at 484; GUNTHER, *supra* note 136, at 444-45; LOCKHART ET AL., *supra* note 136, at 351-52.

279. See, e.g., CHEMERINSKY, *supra* note 136, at 599; GUNTHER, *supra* note 136, at 659; LIVELY ET AL., *supra* note 136, at 633; LOCKHART ET AL., *supra* note 136, at 1339; STONE ET AL., *supra* note 136, at 697. But see FARBER ET AL., *supra* note 136, at 298, which heads up

ultimately a case about gender discrimination, it involves many other issues. Decided the day after the *Slaughterhouse Cases*,²⁸⁰ *Bradwell* involves similar issues regarding a state's police powers and the Supreme Court's interpretation of the Privileges and Immunities Clause.²⁸¹ Highlighting *Bradwell* as "gender-related" separates it from mainstream Constitutional Law. It relegates the case as a feminine "add-on" to the study of Constitutional Law and thus minimizes its significance. *Minor v. Happersett* has fared even worse than *Bradwell*. *Minor* is rarely included within Constitutional Law texts.²⁸² This is true despite its relationship to earlier interpretations of the Privileges and Immunities Clause, and its overlap with issues relating to the interpretations of the anti-slavery amendments.²⁸³

The greatest marginalization, however, appears to have been done to the Suffrage Movement. Even within the Constitutional texts that include an historic overview of the period in which the Thirteenth, Fourteenth, and Fifteenth Amendments were enacted, the Suffrage Movement is generally not mentioned.²⁸⁴ In a 1971 article, at a time in which the Equal Rights Amendment was being debated, Ruth Ginsburg proclaimed that leaving out a mention of the Equal Rights Amendment in contemporary texts is like leaving out *Brown v. Board of Education*.²⁸⁵ This is similarly true for the Suffrage Movement. Failing to acknowledge the impact of the Suffrage Movement within legal history is tantamount to disregarding nearly all feminist contributions to the development of legal theory prior to the 1970s.²⁸⁶ A comparable, if not unimaginable, parallel would be the elimination of any material regarding slavery, abolitionism and racial discrimination prior to *Brown v. Board of Education* had the Thirteenth, Fourteenth and Fifteenth Amendments not been ratified until the mid-Twentieth century.

There are many steps law schools might take to ensure that the accomplishments of females within legal history are not marginalized. First and foremost, however, there must be a recognition of the problem. While

the Gender Discrimination section with the writings of Abigail Adams and reference to the Suffrage Movement.

280. See, e.g., STONE ET AL., *supra* note 136, at 697.

281. *Bradwell v. Illinois*, 83 U.S. (16 Wall) 130, 139 (1872).

282. But see CHEMERINSKY, *supra* note 136, at 600; FARBER ET AL., *supra* note 136, at 301; STONE ET AL., *supra* note 136, at 698. *Minor v. Happersett*, 88 U.S. (21 Wall) 162 (1874).

283. But see STONE ET AL., *supra* note 136, at 611.

284. See, e.g., COHEN & VARAT, *supra* note 270, at 21-23; GUNTHER, *supra* note 136, at 396-400; LOCKHART ET AL., *supra* note 136, at 342-43. But see FARBER ET AL., *supra* note 136, at 299-300, which includes a section on the Suffrage Movement, its relationship to Abolitionism and the anti-slavery amendments.

285. See Ginsburg, *supra* note 259, at 484; *Brown v. Board of Educ.*, 349 U.S. 294 (1955).

286. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677 (1973).

many law schools now include feminist issues or the feminine perspective within their curriculum, it is unclear that the legal academy recognizes that the standard text material within the core curriculum often lacks sufficient acknowledgment of female contribution. Without such recognition, there is obviously no need to change.

Recognition of the problem is a necessary first step. Next, there needs to be an overhaul, or at least serious scrutiny, of three major elements of the legal academy that have not been seriously challenged: what constitutes legitimate legal scholarship, whether the teaching of Constitutional Law necessitates the integration of history and whether the case method, or at least case selection as it now exists in standard Constitutional texts, is adequate for an appropriate, evenhanded, presentation of Constitutional Law.

In many respects, all three of these involve the textbooks themselves. If the norm and not the exception would be to include emphasis on women's achievement and more of what is regarded as nontraditional scholarship, then different materials would be incorporated into the textbooks. If, however, there is no demand by the legal institution for such a change, there would be no incentive for text editors to substantially change a tried and true product, nor would there be a demand by publishers for other authors to produce like materials.

Admittedly, it is easier to add a paragraph about *Bradwell* than to reformulate an entire chapter. But reformulation and integration is vital. Otherwise, with *Bradwell* and *Muller* primarily in the notes, their emphasis will be left solely in the hands of the professor who may or may not choose them to be integral to the course. If *Minor* is not included in the textbooks at all, its emphasis in the classroom is highly unlikely. If these cases received "major" emphasis within most respected Constitutional Law texts, their emphasis in the classroom would not be subject to chance.

The efforts of some current casebook authors,²⁸⁷ in this respect, should not be overlooked. In a new Constitutional Law text published by the Anderson Publishing Company, the authors do not relegate *Muller* to a note case, but rather include it within mainstream discussion as it relates to *Lochner* and its successors.²⁸⁸ Following both *Lochner* and *Muller* is a discussion relating the two cases and how the cases fit in historically.²⁸⁹ The "Brandeis Brief" is mentioned,²⁹⁰ but *Muller* is seemingly not mini-

287. Anderson Publishing Company has published a Constitutional Law text put together a little differently than other mainstream texts. Entitled "Cases, History, and Dialogues" rather than "Cases and Materials." LIVERY ET AL., *supra* note 136. The book has two female and two male authors. The presentation of cases is more historically integrated with discussion about why certain decisions were reached.

288. *Id.* at 31.

289. *Id.* at 32-33.

290. *Id.* at 31.

mized or isolated as only a "woman's" case.²⁹¹ In addition, the authors of the text make reference to both a male and female Constitutional Law scholar in their discussion preceding their segment on Substantive Due Process.²⁹² It should not be surprising to find that two of the four textbook authors are female.²⁹³

Part of the efficacy of the Anderson text is the explanation and "Dialogue" between the cases that give a context for understanding each case. Whether by design or not, most Constitutional Law texts neither proceed chronologically nor by any set order of Constitutional Law principles. While this is not necessarily a problem in and of itself, the total abstraction from historical context, without textual clarification, once again enables a professor to leave out what is believed to be insignificant. Since women were not generally involved in creating a traditional source of law, it is logical to assume that their mention would only be included within an integration of historical explanation.

Barring some sort of woman recognition mandate, there are admittedly no surefire solutions to the non-recognition problem. Most certainly there needs to be both acknowledgment and leadership. The leadership could come through the American Association of Law Schools or the American Bar Association by way of establishing a committee to look into the situation and make institutional recommendations (such as with the MacCrate Report).²⁹⁴ It could also come from professors of Constitutional Law and American Legal History who could (and perhaps have) design(ed) a more evenly represented curriculum. It could come from respected Constitutional Law scholars and authors who might revise some of the more widely used texts. It could also come from the legal publishers themselves who would take more of a chance on publishing and publicizing textbooks that are constructed innovatively. Ideally, all of these might occur concurrently.

CONCLUSION

One would hope that everyone in the legal profession acknowledges the marginalization of female achievements made during the formation of our country. Few men today would regard all women as too delicate for

291. *Id.*

292. *See id.* at 26 (i.e., Suzanna Sherry and Daniel Farber).

293. There is now another Constitutional Law textbook co-authored by a female. The Thirteenth Edition of *Constitutional Law* by Gerald Gunther is now co-authored by Kathleen M. Sullivan. *See GUNTHER ET AL., supra* note 136.

294. *ABA Task Force on Law Schools and the Profession, Legal Education and Professional Development—An Educational Continuum* (Robert MacCrate ed., 1992). The MacCrate Report is the end result of a study of law school curriculum commissioned by the American Bar Association. The report ultimately concluded that law schools should offer more skills-based courses.

rigorous mental work or suggest that males, as a class, are more intelligent than females. In many respects, we are left with this history and must work with it, perhaps not expecting too much too soon.

While the efforts of many professors and law schools²⁹⁵ should not be slighted, those efforts must extend considerably further. Women have already earned their place within the establishment of our legal jurisprudential society. They have been integral to the development of our Constitutional framework and should be acknowledged as such. With the legal profession nearing the point of being half populated by women,²⁹⁶ it is important that legal education provide exposure to historical female role models rather than perpetuate the mistaken belief that anything accomplished will be trivialized or will be done only against overcoming the overwhelming odds of breaking into the male-dominated hierarchy of the law.²⁹⁷ Legal education must also provide exposure to the historical record of female accomplishment and set in place curricular structures to prevent future marginalization.

There is an additional consideration. Throughout the course of American legal history, the male-dominated power structure has systematically excluded females from positions of power.²⁹⁸ Now that some females have achieved power, they are still relegated to being on the outside looking in. Female legal educators must teach about a system from which they have been historically ostracized and one that fails to acknowledge that women's influence has been significant within the development of the law.²⁹⁹

The law has often been used to perpetuate injustice rather than rectify it. As educators of those who will create and enforce future laws that ideally will neither perpetuate discrimination nor the marginalization of achievements, law schools must play an important part. Law schools are the creators of leaders and should be at the forefront of progressive action. Jane Addams commented, "Old-fashioned ways which no longer apply to changed conditions are a snare in which the feet of women have always

295. See, e.g., Marsha Garrison et al., *Succeeding in Law School: A Comparison of Women's Experiences at Brooklyn Law School and the University of Pennsylvania*, 3 MICH. J. GENDER & L. 515 (1996).

296. For statistics, see AMERICAN BAR ASSOCIATION, SECTION ON LEGAL EDUCATION, *A Review of Legal Education in the United States* 67 (1996).

297. See Farley, *supra* note 254, n.89.

298. In commenting upon the protectionist philosophy of the legal system that did not even moderately shift gears until the 1970s, Justice Ruth Bader Ginsburg has stated, "To turn in a new direction, the Court first had to comprehend that legislation apparently designed to benefit or protect women could often, perversely, have the opposite effect." Ginsburg, *supra* note 62, at 20.

299. For a discussion of additional "flaws" of the legal education system, see DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HEIRARCHY: A POLEMIC AGAINST THE SYSTEM* 119-23 (1983).

become readily entangled."³⁰⁰ This should be an assessment that no longer holds true for legal education. Legal educators must rethink their roles in reflecting the reality of the times and remedying the shortsightedness of their predecessors who would not rise above the societal prejudices of their time.³⁰¹ While a new generation need not be vilified for a shortsighted past, it has the power to rectify some injustice by acknowledging both the reality and validity of feminine influences in shaping legal theory in our country.

300. THE MACMILLAN DICTIONARY OF QUOTATIONS, *supra* note 70, at 210.

301. The portraits on the walls of many respected legal institutions are primarily of men although it was many of those very men who allowed the exclusion of women from within their ranks. See, e.g., Brett S. Martin, *Students Protest Hall of "Dead White Males,"* NAT'L JURIST, May/June 1997, at 11.